IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1945

No. 107

INTERNATIONAL SHOE COMPANY, Appellant,

v.

STATE OF WASHINGTON, OFFICE OF UNEMPLOYMENT COMPENSATION AND PLACEMENT and E. B. RILEY, COMMISSIONER.

APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON.

BRIEF OF APPELLEES

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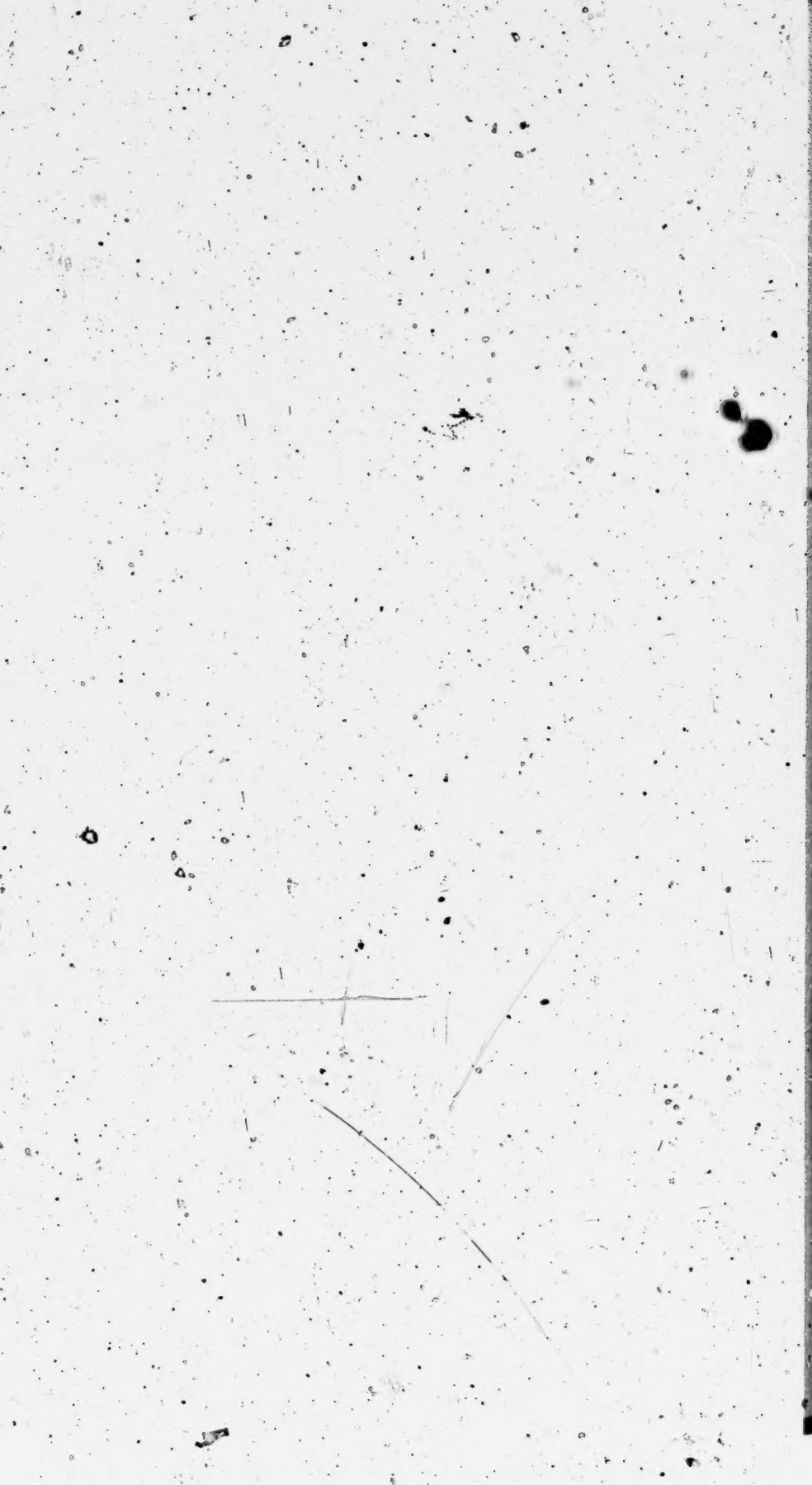

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OPINIONS BELOW

The statutory appeal tribunal decision, decision of commissioner, and judgment of superior court below are included on pages 23, 38 and 41 respectively of the record. The opinion of the supreme court of Washington in the

case below is officially reported as *International Shoe Company v. State*, 122 Wash. Dec. 135, 154 P. (2d) 801, and appears in the transcript of record at page 59 ff. thereof.

JURISDICTION

The jurisdiction of this court is invoked by appellant "under Section 237 of the Judicial Code as amended [Title 28, U. S. C. A., Sections 344(a) and 861(a)] providing for the review by the Supreme Court on appeal, where is drawn in question the validity of a statute of any State on the ground of it being repugnant to the Constitution of the United States, and the decision is in favor of its validity." (Appellant's brief, p. 2.)

QUESTIONS PRESENTED

1. Does the state of Washington, without violating the due process clause of the Fourteenth Amendment to the constitution, have the power and jurisdiction to impose liability for unemployment compensation contributions required by the Washington unemployment compensation act upon appellant, a foreign corporation, not licensed to do business in the state, in view of the activities of appellant's salesmen within the state?

2. Did service of process had in this cause bring appellant within the jurisdiction of the Washington courts and without violation of the due process clause of the Fourteenth Amendment to the constitution?

STATEMENT

While appellant's statement of the cause is, in most respects, adequate, determination of this appeal resting, as it must, on the view taken of the facts disclosed as to the extent of appellant's activities within the state, we feel justified, at the expense of repetition, in setting forth here a statement of the facts upon which we submit the supreme court of the state of Washington properly determined that appellant was liable for the tax imposed; that appellant was doing such business within the state as to be subject to the jurisdiction and power of the state to impose the tax; that appellant's business within the state was such as to subject it to the jurisdiction of the Washington courts, pursuant to the service of process which was had on one of its salesmen in the state, and that judgment against appellant did not violate the due process clause of the Fourteenth Amendment to the constitution. *International Shoe Co. v. State of Washington*, 122 Wash. Dec. 135, 154 P. (2d) 801.

The record discloses:

1. Appellant, International Shoe Company, a Deleware corporation, with a principal place of business in St. Louis, Missouri, has as its principal business the manufacture and *sale* of footwear. (R. p. 15; Stp. F., Exhibit 1, R. p. 9.)

2. Merchandise is sold in Washington through four *selling branches* of the company: (1) the Roberts, Johnson & Rand branch of the International Shoe Company,

(2) the Peters branch of the International Shoe Company; (3) the Friedman-Shelby branch of the International Shoe Company, and (4) the Specialty branch of the International Shoe Company (R. pp. 15-16.) So far as appears from the record, these "branches" are no more than nominal designations of particular sales units of the company. (R. p. 15.)

3. Company, in its business of selling in the state of Washington for four years, 1937 through 1940, employed from eleven to thirteen salesmen, all of whom resided in the state and whose principal activity was the sale of the company's merchandise within the state. (R. pp. 16-17, 19-22, incl.)

4. Commissions paid to company's representatives in the state of Washington for the four years, 1937 through 1940, indicate the volume and extent of business of the company carried on by the salesmen and that it did not consist of scattered or isolated transactions, but rather a continuous course of business; the total commissions paid for 1937 being $36,098.19, for 1938 being $32,075.63, for 1939 being $33,846.44, and for 1940 being $31,879.19—or a total paid out for commissions alone in the four year period of $133,899.45. (R. pp. 19-22 incl.)

5. All of the eleven to thirteen salesmen whose principal activities are selling within the state of Washington are employed by the company and work (in the state of Washington) under the direct supervision and control of sales managers (sales managers being located

in St. Louis). Each salesman has a designated territory within the state. (R. pp. 17, 18.)

6. Salesmen have sample lines, property of the company, issued to them for display to prospective purchasers, said merchandise being kept in the state of Washington in display rooms. (R. pp. 16, 17.)

7. Company pays for sample or display rooms (cost advanced by salesmen who are reimbursed by the company). Some of these display rooms are permanently established in business buildings in various cities in the state, and some are changed from time to time from hotel display rooms or space in business buildings rented in the particular city which the salesmen happen to be working. (R. pp. 16-17.)

8. Merchandise sold in Washington is shipped into the state on orders taken here; orders being approved in St. Louis. Shipments are invoiced at point of shipment. (R. p. 17.)

9. None of the salesmen are permitted to engage in an independently established trade, occupation, profession, or business of the same nature as is involved in selling the company's merchandise. (R. p. 17.)

10. Salesmen are in this state continuously active in their respective territories devoting full time to the building up of the business of the company within the state. (R. p. 16-17.)

11. There is a detailed program followed by the company through contact with the salesmen to keep the company's business at a high level, to eliminate difficulties arising in the particular territories, and to discuss

credit of Washington purchasers and customers with whom the company is doing business—said contact being had by means of conventions held in St. Louis twice a year with the salesmen of the four company branches in the state of Washington being compelled to attend sometimes only once a year; each branch, for a part of the time, meeting at a different hotel. At such conventions all matters touching on the company's business in the state are discussed in detail and the salesmen are instructed as to the company's line of merchandise—probable trends—styles—advertising (advertising quotas being assigned to salesmen)—manufacturing details—prices and terms of sale of merchandise—what particular items to sell and how much, etc. (R. pp. 11-13 incl.; 16.)

12. Expenses of traveling salesmen paid by company. (R. pp. 16-17.)

13. Company has been engaged in doing business in the state of Washington for many years; Edward S. Alley being with the company since 1924, and with Friedman-Shelby branch since 1936. (R. p. 10; 19-22 incl.)

14. Credit is extended by company to Washington purchasers indicating an interest of the company in stocks of merchandise held in this state by purchasers. Company checks on credit, in part at least, through its salesmen. (R. p. 12.)

SUMMARY OF ARGUMENT

I.

The Tax In Question—Its Nature, Purpose, and Application to Activities of Appellant's Salesmen in the State of Washington

The tax is an excise tax on the privilege enjoyed by appellant in Washington of having individuals in its employment perform services for it within the state. Distinction exists between cases involving such a tax and those concerned with a regulatory tax or licensing requirements. Details of appellant's business occurring outside of state are irrelevant. Appellant is liable for tax under the state's statutes. State and federal statutes on the subject contemplate the levy of unemployment insurance taxes against foreign corporations for services performed for them in the state.

II.

Nature and Extent of Appellant's Business in Washington

Appellant's business in Washington was such as to justify the legal conclusion of appellant's presence in the state, thereby rendering appellant subject to the state's power and jurisdiction to tax. The "solicitation-plus" rule. Obtaining orders was the heart of appellant's business. Appellant being present in state, appellant was subject to jurisdiction and power of state to tax.

III.

Character and Extent of Appellant's Business As to Service of Process

Appellant was doing sufficient business within the state to render it amenable to process under the state's process statutes. Although present in the state only by

its salesmen agents, appellant was still present through their activities and thus subject to jurisdiction of the state's tribunals and courts.

IV.

Nature of Appellant's Relationship with Salesmen Agents

Appellant's salesmen in the state of Washington had such relationship with appellant as to render service on one of such salesmen valid service on appellant. Appellant's contention of salesmen's limited authority is not controlling.

V.

Effect of State Supreme Court's Determination

Determination of the supreme court of a state is binding on this court as to whether the facts bring a party within the state statutes, both as to liability for a tax and as to effectiveness of service. Whether proper service was had on appellant under the state statute is for the state court to decide.

VI.

The Law Provides No Tax Free Sanctuary

All elements for validity of tax against appellant are present. The subject of the tax, the privilege of having individuals in employment perform services in the state, is within and extended by the state. The appellant is present within the state. Appellant's agent within the state upon whom service was made was such as to render service on such agent valid service on appellant without violating due process. The tendency is to favor jurisdiction.

VII.

Due Process as Applied to Appellant In This Cause

Under the facts and circumstances present, appellant

was given adequate notice by service of process on its salesman agent within the state. Due process in this case is not concerned with elements of control by state over appellant or appellant's business because the tax in question is not concerned with nor does it involve regulatory or control matters. Absence of control or right of regulation by state over foreign corporation do not prevent its presence in the state. Due process under circumstances present here is satisfied with adequate notice, which appellant had. The necessary prerequisites for the validity of the imposition of the tax on appellant being present, and appellant being subject to the taxing power and jurisdiction of the state, and amenable to service, and the service had being adequate notification to appellant so as to constitute due process, the judgment of the state supreme court must be sustained.

VIII.

Appellant's Position

Appellant's position contravenes case and statutory law and public policy. All necessary elements are present for jurisdiction to tax and for process of the state's courts.

IX

Conclusion

ARGUMENT

I.

The Tax Is an Excise Tax On a Privilege Enjoyed By Appellant In Washington

The fundamental question in this appeal is whether the facts disclosed by the record are sufficient to justify the conclusion that appellant was doing business within the state of Washington to such an extent as to be present within the state of Washington. If appellant was present within the state of Washington, then it was subject to the taxing power of the state, and also amenable to service.

Preliminary to this determination, however, it is necessary to have, at the outset, a clear conception of the nature of the tax. It is not a regulatory tax; it is not a license tax.

Section 7(a), chapter 162, Session Laws of the state of Washington, 1937, as amended, Rem. Rev. Stat. Supp. section 9998-107a (Appendix, p. 59), provides that:

> "On and after January 1, 1937, [unemployment compensation] contributions shall accrue and become payable by each employer for each calendar year in which he is subject to this act, with respect to wages payable for *employment* (as defined in section 19(g)) * * *." (Italics ours.)

Section 19(e), chapter 162, Session Laws of 1937, as amended, Rem. Rev. Stat. Supp., section 9998-119(e) (Appendix, p. 59) defines "employing unit" as any individual, organization, etc. "or corporation, whether domestic or foreign * * * which has or subsequent to January 1, 1937, had in its employ one [originally eight]

or more individuals *performing services for it within this state.* * * *"

Section 19(f) of the same act (Appendix, p. 60) defines "employer" as any employing unit which has individuals "in employment."

Section 19 (g) of the same act (Appendix, p. 60) defines the term "employment" as meaning "* * * *service,* including service in interstate commerce, performed for wages or under any contract of hire, written or oral, express or implied."

The same section brings within the term "employment" service performed by individuals for an employer entirely within the state or both within and without the state.

It will be seen from a review of the above state statutes that the tax in question is imposed against appellant on services performed for it within the state of Washington and not, as appellant would have us believe, upon wages paid to individuals performing such services which actual payment occurs outside the state. In short, the subject of the tax is the privilege extended to appellant of having individuals in its employment perform services for it within the state of Washington.

The tax in question is not levied on the privilege of doing business within the state nor on the payment of wages occurring outside the state, but rather is an excise tax on the right to have persons performing services for the employer within the state. *Bates v. McLeod,* 11 Wn. (2d) 648, 654, 120 P. (2d) 472; *Carmichael v. Southern Coal and Coke Company,* 301 U. S. 495, 57 S. Ct. 868, 81 L. Ed. 1245.

It should also be noted that the tax in question is an exercise of the police power of the state of Washington, enacted primarily for the purpose of protecting Washington residents, whose livelihood is dependent upon the performance of services within the state, against the hazards of unemployment. *Bates v. McLeod, supra,* and *Carmichael v. Southern Coal and Coke Company, supra.* The measure of the amount of the tax is wages *payable* (earned) and not wages *paid,* as inferred by appellant. See section 7 (b) of the state act, Rem. Rev. Stat. Supp. section 9998-107(b), (Appendix, p. 59).

The exaction of contributions from employers is, of course, for the purpose of building up a fund from which benefits may be paid by the state to individuals who become involuntarily unemployed.

A second prerequisite to a proper determination of the issues raised by appellant is a recognition of the clear and unmistakable distinction between cases concerned with the question of whether a corporation is doing business within a state within the meaning of statutes prescribing conditions upon which foreign corporations are permitted to do business within a state, and those cases which are concerned, as in the instant case, with whether the corporation is doing such business within the state as to justify the legal conclusion that appellant is "present" in the state and thus subject to the power of the state to levy against it an excise tax of the nature here in question. It likewise follows that if appellant's business may be so considered, then appellant is likewise present within the state so as to be amenable to the service of process upon it.

Tax cases turning on the question of whether the state had a right of control over a foreign corporation or a right

to prevent foreign corporations from doing business within the state or the power to regulate the business of a foreign corporation are primarily concerned with the question of whether there has been, in the imposition of such taxing power, a violation of the commerce clause of the constitution. With such cases we are not here concerned. If a foreign corporation is doing business so as to be "present," due process is afforded by adequate notice of the action brought. This court, in its order noting probable jurisdiction, on June 18, 1945, specified that it did not care to hear argument on the question of whether the statutes attacked placed an undue burden on interstate commerce (R. p. 123). The field of inquiry is quite narrow. Did appellant do sufficient business and of such character in the state so as to be present within the state and subject to the power of the state to levy the excise tax in question and be amenable to service of process, without violation of the due process clause of the Fourteenth Amendment to the constitution?

Attention, we think, should also be called to the fact that both state and federal legislation contemplate imposition by the state on a foreign corporation of such a tax as here in question. Section 1606 (a) of the Internal Revenue Code (Appendix, p. 66) precludes immunity from the tax in question on the part of a foreign corporation, as do sections 19 (e), (f) and (g) of the state unemployment compensation act. Rem. Rev. Stat. Supp. 9998-119 (e), (f) and (g) (Appendix, pp. 59-60). The position of appellant fails to take into consideration the important fact that the particular tax here in question, unlike a franchise or regulatory tax, does not depend upon the location or the presence of the employer, but on the place where the services are performed.

Further as to the distinctions in the types of cases see *International Text Book Company v. Tone*, 220 N. Y. 313, 115 N. E. 914, 915; *Tauza v. Susquehanna Coal Company*, 220 N. Y. 259, 115 N. E. 915, 917; *State v. Scott*, 98 Tenn. 254, 39 S. W. 1, 36 L. R. A. 461; *Lamont v. S. R. Moss Cigar Company*, 218 Ill. App. 435; *Pergl et al. v. United States Axle Company et al.* (Illinois, 1943), 50 N. E. (2d) 115; *Frene v. Louisville Cement Co.*, 134 F. (2d) 511, 146 A. L. R. 926; *International Harvester Co. v. Kentucky*, 234 U. S. 579, 58 L. Ed. 1479.

While we agree with appellant that facts sufficient to render a foreign corporation amenable to process of the courts may not be sufficient to render it subject to a *regulatory* or *licensing* tax, it is well settled that an excise tax, such as here in question, enacted under the police power of the state for the protection of individuals performing services within the state, is not in the same category.

II.

Appellant's Business In Washington Was Such as to Render It Subject to the State's Power and Jurisdiction to Impose the Tax in Question

That a foreign corporation cannot escape its just share of the burden of state taxation, merely because it is a foreign corporation, unless such taxation is in violation of the constitutional protection afforded to interstate commerce (which is not here involved), is well settled. Net earnings from interstate commerce are subject to income tax. *United States Glue Company v. Oak Creek*, 247 U. S. 321, 62 L. Ed. 1135. Taxation measured by gross receipts from interstate commerce has been sustained, when fairly apportioned to commerce carried on within the taxing state. *Wisconsin and M. Railway Company v. Powers*,

191 U. S. 379, 48 L. Ed. 229; *United States Express Company v. Minnesota*, 223 U. S. 335, 56 L. Ed. 459.

In *Equitable Life Society v. Pennsylvania*, 238 U. S. 143, 59 L. Ed. 1239, this court sustained the validity of a Pennsylvania statute laying an annual tax on gross premiums of every character received from business done by the defendant within the state during the preceding year. The right to control the doing of business within the state is not a prerequisite. In the last cited case, the court held that the tax was a tax for the privilege of doing business in Pennsylvania, and was valid, though measured in part by gross premiums paid on policies, the making of which the state could not prevent.

It was held in *Steward Machine Company v. Davis*, 301 U. S. 548, 580 *et seq.*, 81 L. Ed. 1279, that the fact that California could not prohibit or impose conditions upon the exercise of the right to enter into an employment relationship in California did not prevent it from imposing a tax on the exercise of that right in California. See also *General Trading Co. v. State Tax Com. of Iowa*, 322 U. S. 335, 64 S. Ct. 1028, where on the basis of solicitation of orders by travelling salesmen in Iowa, a Minnesota corporation, not qualified to do business in Iowa, was held not merely to be doing business in Iowa, but rather to be a "retailer maintaining a place of business" there. The Iowa use tax was sustained on that basis as not unconstitutional.

The leading case on the question before us is that of *International Harvester Company v. Kentucky*, 234 U. S. 579, 34 S. Ct. 944, 58 L. Ed. 1479. In this case, the company's only business involved was conducted by salesmen; the salesmen's authority was limited to taking orders

for the company's products, said orders being subject to the approval of the general agent outside of the state; all goods were shipped from outside the state after orders were approved; the salesmen had no authority to make any contract of any kind, but were authorized to receive money, checks or drafts from purchasers indebted to the company; they had no authority to make any allowance or compromise disputed claims; all contracts of sale were f. o. b. some point outside the state, and became the property of the customer when delivered to the carrier outside of the state.

The court, on the basis of the facts in the *Harvester Company* case, held that the corporation, through the activities of its agents, was present within the state of Kentucky and that service on one of its agents in Kentucky was valid service on the corporation.

Speaking of this case, Mr. Justice Cardozo, for the court, in *Tauza v. Susquehanna Coal Company*, 220 N. Y. 259, 115 N. E. 915, 917, stated as follows:

> "* * * The question in such cases is not merely whether the corporation is here, but whether its activities are so related to interstate commerce that it may, by a denial of a license, be prevented from being here. (Citing cases.) 'A statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional, but also grave doubts upon that score.' (Citing cases.) But the problem which now faces us is a different one. It is not a problem of statutory construction. It is one of jurisdiction, of private international law. Dicey, Conflict of Laws, pp. 38, 155. *We are to say, not whether the business is such that the corporation may be prevented from being here, but whether its business is such that it is here. If in fact it is here, if it is here, not occasionally or casually, but with a fair measure of permanence and continuity, then, whether its business is interstate or local, it is within*

the jurisdiction of our courts. (Citing the *International Harvester* case, *supra.*) To hold that a state cannot burden interstate commerce, or pass laws which regulate it, 'is a long way from holding that the ordinary process of the courts may not reach corporations carrying on business within the state which is wholly of an interstate commerce character.' 234 U. S. at p. 588, 34 Sup. Ct. at p. 947, 58 L. Ed. 1479. * * * The nature and extent of business requisite to satisfy the rules of private international law may be quite another thing. * * * Unless a foreign corporation is engaged in business within the state, it is not brought within the state by the presence of its agents. But there is no precise test of the nature or extent of the business that must be done. *All that is requisite is that enough be done to enable us to say that the corporation is here.* (Citing cases.) *If it is here is may be served.* (Citing cases.) * * *" (Italics ours.)

It is, of course, appellees' contention in the instant case that through the activities of its agents, appellant did sufficient business within the state of Washington to justify the legal conclusion that appellant was present within the state of Washington and thus not only amenable to service of process (of which more will be said later), but, being present, was also subject to the jurisdiction of the state to impose the tax in question, there being no prohibition in so far as the commerce clause of the constitution is concerned. Generally, as to the taxing power of a state in respect to foreign corporations, the case of *Hoopeston Canning Company v. Cullen,* 318 U. S. 313, 63 S. Ct. 602, 87 L. Ed. 777, 782, is in point. It was there stated:

"In determining the power of a state to apply its own regulatory laws to insurance business activities, the question in earlier cases became involved by conceptualistic discussion of theories of the place of contracting or of performance. More recently it has been recognized that a state may have sub-

stantial interest in the business of insurance of its people or property regardless of these isolated factors. This interest may be measured by highly realistic consideration such as the protection of the citizen insured or the protection of the state from the incidence of loss. *Alaska Packers Ass'n v. I. A. C.*, 294 U. S. 532, 542, 79 L. Ed. 1044, 1049, 55 S. Ct. 518.

* * *

"The actual physical signing of contracts may be only one element in a broad range of business activities. *Business may be done in a state although those doing the business are scrupulously careful to see that not a single contract is ever signed within that state's boundaries.* Important as the execution of written contracts may be, it is ordinarily but an intermediate step serving to tie up prior business negotiations with future consequences which themselves are the real object of the business transaction.

* * *

"We conclude that in determining whether insurance business is done within a state for the purpose of deciding whether a state has power to regulate the business, considerations of the location of activity prior and subsequent to the making of the contract, *Osborn v. Ozlin, supra,* of the degree of interest of the regulating state in the object insured, and of the location of the property insured, are separately and collectively of great weight. Applying any of these tests, it is apparent that the reciprocals are doing business in New York and are thereby subject to regulation by that state." (Italics ours.)

Applying the principles enunciated in the above case to the facts of the instant cause compels a conclusion that there can be no question but that here the tax was validly and constitutionally levied against appellant, for we see that the place of entering into the contract of employment, the payment of wages, the fact of shipping from outside of the state, and other isolated factors or incidents occurring outside of the state, are in nowise controlling. The subject of the tax,—the taxable event—to wit, the

performance of services, was within the state and even the measure of the amount of the tax is calculated on the basis of wages *earned* within the state; payment, alone, for such services being made outside of the state.

We also see that here the state had a keen public interest in the purpose for which the tax was levied, namely, the protection of the citizens of the state and those working within the state against the hazards of unemployment.

The importance of the state's interest in the subject and purpose of the tax is forcibly brought out in *Hoopeston Canning Company v. Cullen, supra,* where the question was whether a reciprocal insurance association which insured against risks, and whose attorneys in fact were located in Illinois, might constitutionally be made subject to the laws of New York as a condition of insuring property in that state. When we bear in mind the fact that the court there was concerned with a statute imposing a *condition* of doing business, which it sustained as valid; that in the instant case no question of appellant's right to do business or of regulation of appellant's business is involved whatsoever, and that the state's interest in the subject of the tax (enacted under the police power of the state) is even more evident in this case, the import of the *Cullen* decision, *supra,* is more potent.

It is also interesting to note that in the *Cullen* case, *supra,* the wisdom of the court's decision in *Allgeyer v. Louisiana,* 165 U. S. 578, 17 S. Ct. 427, 41 L. Ed. 832, relied on by appellant in this cause in support of its position, was strongly questioned, and the *Allgeyer* case and its line of decisions clearly distinguished, the court saying, at page 783 of 87 L. Ed.:

"* * * The *Allgeyer* and subsequent insurance cases have been recently considered in *Griffin v. McCoach, supra* (313 U. S. at 506, 507, 85 L. Ed. 1486, 1487, 61 S. Ct. 1023, 134 A. L. R. 1462) and in *Osborn v. Ozlin*, 310 U. S. 53, 66, 84 L. Ed. 1074, 1079, 60 S. Ct. 758; as the analysis in those opinions clearly indicates, the *Allgeyer* line of decisions cannot be permitted to control cases such as this, *where the public policy of the state is clear, the insured interest is located in the state, and there are many points of contact between the insurer and the property in the state.*" (Italics ours.)

The case is not to be determined upon the basis of transactions or activities in connection with appellant's business which did not occur within the state. Rather, the question is, were those activities which did take place within the state of sufficient character and extent to justify the conclusion that appellant itself was present within the state. Our thought is well stated by Mr. Justice Gavegan, speaking for the New York supreme court, in the case of *Heer and Company v. Rose Bros. Company*, 120 Misc. Rep. 723, 200 N. Y. S. 397, 401, where he says, in respect to a similar problem:

"*The question is not whether certain indicia are absent. Their absence does not inhibit a finding from positive evidence that defendant is conducting business in this state on a very considerable scale.* Because we do not see the signs which we seek, we may not disregard what is evident. There would be no difference of substance if such signs were present, if concededly defendant authorized or ratified the lettering on the door, if it paid Hill a salary and paid the expenses of the office without charging them against him, or if it had more property or a bank account here. The business defendant seeks and obtains here, and its method of doing business here would not be different. What defendant does in this state is not, as defendant would have it, the 'mere solicitation' referred to in some of the cases. The fact is that a large volume of business vital to de-

fendant is systematically conducted by it here, at what is the central market in its main line. Shipments are continually made to fill orders obtained in New York City by salesmen who remain here and by others who center at New York City in season."

Of interest at this point also is the case of *Osborn v. Ozlin*, 310 U. S. 53, 60 S. Ct. 758, 84 L. Ed. 1074, 1078, wherein the court, speaking through Mr. Justice Frankfurter, commented as follows:

"But the question is not whether what Virginia has done will restrict appellants' freedom of action outside Virginia by subjecting the exercise of such freedom to financial burdens. The mere fact that state action may have repercussions beyond state lines is of no judicial significance so long as the action is not within that domain which the Constitution forbids. *Alaska Packers Asso. v. Industrial Acci. Commission*, 294 U. S. 532, 79 L. Ed. 1044, 55 S. Ct. 518; *Great Atlantic & P. Tea Co. v. Grosjean*, 301 U. S. 412, 81 L. Ed. 1193, 57 S. Ct. 772, 112 A. L. R. 293. Compare *Equitable Life Assur. Soc. v. Pennsylvania*, 238 U. S. 143, 59 L. Ed. 1239, 35 S. Ct. 829. It is equally immaterial that such state action may run counter to the economic wisdom either of Adam Smith or of J. Maynard Keynes, or may be ultimately mischievous even from the point of view of avowed state policy. Our inquiry must be much narrower. It is whether Virginia has taken hold of a matter within her power, or has reached beyond her borders to regulate a subject which was none of her concern because the Constitution has placed control elsewhere. Compare *Wallace v. Hines*, 253 U. S. 66, 69, 64 L. Ed. 782, 786, 40 S. Ct. 435."

Later in the opinion, after citing cases dealing with the state's power to preempt the field of insurance, it was stated, at page 1080 of 84 L. Ed.:

"* * * If the state, as to local risks, could thus pre-empt the field of insurance for itself, it may stay its intervention short of such a drastic step by insisting that its own residents shall have a share in

devising and safeguarding protection against its local hazards. *La Tourette v. McMaster*, 248 U. S. 465, 63 L. Ed. 362, 39 S. Ct. 160. * * * The limit of our inquiry is reached when we conclude that Virginia has exerted its powers as to matters within the bounds of her control."

We think it evident that to follow the principles underlying the decision in the *Osborn* case, *supra*, will compel the conclusion that the state of Washington's interest in the protection of its citizens and workers against the hazards of involuntary unemployment is such as to sustain the imposition of the tax in question by the state against appellant, without exerting powers as to matters not within the bounds of the state's control or jurisdiction.

Enlightening as to prerequisites of a state's power to tax is the case of *Wisconsin v. J. C. Penney Company*, 311 U. S. 435, 61 S. Ct. 246, 85 L. Ed. 267; 270, where this court, in describing conditions under which the state may exercise its taxing powers, said:

"* * * A state is free to pursue its own fiscal policies, unembarrassed by the Constitution, if by the practical operation of a tax the state has exerted its power in relation to opportunities which it has given, to protection which it has afforded, to benefits which it has conferred by the fact of being an orderly, civilized society.

"* * * 'Taxable event,' 'jurisdiction to tax,' 'business situs,' 'extraterritoriality,' are all compendious ways of implying the impotence of state power because state power has nothing on which to operate. These tags are not instruments of adjudication but statements of result in applying the sole constitutional test for a case like the present one. That test is whether property was taken without due process of law, or, if paraphrase we must, whether the taxing power exerted by the state bears fiscal relation to protection, opportunities and benefits given by the

state. The simple but controlling question is whether the state has given anything for which it can ask return. The substantial privilege of carrying on business in Wisconsin, which has here been given, clearly supports the tax, and the state has not given the less merely because it has conditioned the demand of the exaction upon happenings outside its own borders. The fact that a tax is contingent upon events brought to pass without a state does not destroy the nexus between such a tax and transactions within a state for which the tax is an exaction. See *Continental Assur. Co. v. Tennessee, supra.* [Citing cases.] * * *"

Also in point is the principle behind the statement of the court in *Hoopeston Canning Company v. Cullen, supra,* 318 U. S. 319, 87 L. Ed. 777, 784:

"* * * The appellants cannot, 'by spreading their business and activities over other states * * * set at naught the public policy' of New York * * *."

What is appellant's business? Where was it performed? As we have seen from the recital of facts in this cause, the heart of appellant's business comes from the orders obtained by its salesmen located and active in the various states including Washington. Again, as was stated in *Heer and Company v. Rose Bros. Company,* 200 N. Y. S. 397, at page 400, in respect to the manufacturing and selling corporation there involved:

"* * * In an essential sense its manufacturing is subordinate to the selling of its products, for presumably it will manufacture only what it can sell. * * *"

Appellant's eleven to thirteen salesmen, during the period in question, were continuously active in obtaining orders for appellant's products. They displayed samples, maintained permanent and temporary display rooms, both in business buildings and hotels, were concerned with the

credit of customers, and discussed the same with appellant on convention trips to St. Louis in order to facilitate getting more orders, and, presumably, to protect appellant in respect to its accounts in the state of Washington, and continuously solicited orders within the state of Washington, all of which resulted in a continuous flow of a great volume of merchandise into the state.

It was primarily the continuous solicitation of orders, coupled with the other mentioned activities of the salesmen, resulting in the continuous flow of a great volume of merchandise into the state that compelled the supreme court of the state of Washington in the case below, *International Shoe Company v. State*, 122 Wash. Dec. 135, 154 P. (2d) 801, to hold that appellant was not brought within the "mere solicitation" rule discussed in *International Harvester Company v. Kentucky, supra*, and the other cases cited herein. That a systematic and continuous course of business in the solicitation of orders and the shipment of a large volume of merchandise, pursuant thereto, to numerous customers constituted, without more, "doing business" in the jurisdictional sense, is amply supported on authority of *International Harvester Company v. Kentucky*, 234 U. S. 579, 58 L. Ed. 1479; *Frene v. Louisville Cement Company*, 134 F. (2d) 511; *Tauza v. Susquehanna Coal Company*, 220 N. Y. 259, 115 N. E. 915; *American Asphalt Roof Corporation v. Shankland*, 205 Iowa 862, 219 N. W. 28; and *Haskell v. Aluminum Company of America* (D. C.), 14 F. (2d) 864. See also *General Trading Co. v. State Tax Com'n of Iowa*, 322 U. S. 335, 64 S. Ct. 1028 (concurring opinion 322 U. S. 349, 64 S. Ct. 1030).

Appellant, in the present appeal, urges that such matters as display of samples, continuity and volume of

solicitation and sales, etc., are merely incidental to the solicitation of orders and, therefore, constitute nothing more than "mere solicitation."

Applicable to such an argument is the answer given by Mr. Justice Rutledge, speaking for the United States court of appeals for the District of Columbia, in the case of *Frene v. Louisville Cement Company*, 134 F. (2d) 511, 518, 146 A. L. R. 926, to an argument there presented that acts of an agent which benefited the principal and promoted good will of the business of the principal was nothing more than "mere solicitation." It was there stated:

> "* * * The second fallacy is that anything which promotes good will is 'mere solicitation.' According to that criterion everything an employer or an agent might do which would tend to cause customers to return or new ones to come by learning of the satisfaction of old ones, would be 'mere solicitation,' and only acts harmful to the employer's interests would be a part of his business for jurisdictional purposes. The criterion is obviously untenable."

Appellant, as noted, asserts that the state of Washington has no control over appellant; that it could not and did not require registration, and that even if appellant had had a resident agent authorized generally to receive service, the state could still not impose jurisdiction because of said lack of control.

This proposition might be granted if the tax in question were a regulatory tax or one imposed for the privilege of doing business or a licensing tax. We are not, however, concerned with such a tax. The question is much more simple. If, under the "implied consent" or "presence" theories, appellant was present within the state of Washington during the period in question, then we

submit that, there being no hindrance by reason of the interstate commerce clause of the constitution, appellant cannot avoid the results of its presence, which make it not only amenable to service but also subject to the power and jurisdiction of the state to impose upon a corporation which is "present" an excise tax, such as that here in question, based upon a privilege which is enjoyed by the appellant in the state of Washington.

III.

Appellant Did Business Within the State of Washington to Such an Extent as to Render It Amenable to Service of Process Within the State and Subject to the Jurisdiction of the State's Courts

The facts necessary to establish that a foreign corporation is doing business within the state depend entirely on the nature of the action and the issues involved. Even without regard to the distinctions mentioned, however, a new concept has been generally adopted by the courts and jurisdiction of the local forum over foreign corporations is now held to exist on a showing of "doing business" within the forum which formerly was deemed inadequate. An exhaustive treatise on authorities to this point is found in *Frene v. Louisville Cement Compand*, 134 F. (2d) 511, 515, 146 A. L. R. 926, and annotation, 146 A. L. R. 941. In this case the court stated the present concept as follows:

> "* * * In other words, the fundamental principle underlying the 'doing business' concept seems to be the maintenance within the jurisdiction of a regular, continuous course of business activities, whether or not this includes the final stage of contracting. * * *"

As stated by the annotators in 60 A. L. R. 994 at p. 995:

> "Whether or not a foreign corporation is 'doing business' within a state depends upon the issues involved in the proceedings in which the question is raised. *Such a corporation may be doing business within the state so as to be subject to the jurisdiction of the local courts and amenable to service of process therein, and yet not be subject to a statute regulating foreign corporations or prescribing conditions or their doing business within the state.* The basis of this distinction lies in the fact that the power of the state to subject a foreign corporation to local regulations is restricted by the commerce clause of the Federal Constitution, but that a state may subject such corporation which is 'present' in the state to service of process therein, notwithstanding the fact that the *local* activities of the corporation are confined to transactions in interstate commerce, the state's power to provide for such service of process not being affected by the commerce clause of the Federal Constitution." (Citing cases—including *International Harvester Company v. Kentucky* (1914), 234 U. S. 579, 58 L. ed. 1479, 34 S. Ct. 944; and *Tauza v. Susquehanna Coal Company*, (1917), 220 N. Y. 259, 115 N. E. 915). (Italics ours.)

It will be conceded that if the company was doing business within the state of Washington so as to subject it to service of process by the state, it was doing so through its salesmen. In this regard, the comment in the *State v. Scott* case, *supra*, 39 S. W. 1, is in point, where it is stated:

> "* * * Instead of coming into this state themselves to solicit orders, those citizens of other states employ agents to do that for them; *and what the agents do has the same relation to, and the same effect upon, the ultimate and finished transaction, as would the same thing if done in person by those citizens of other states.* With respect to that par-

> ticular matter, the agents stand before the law exactly as their principals would stand if they had come on the same mission, * * * *." (Italics ours.)

On this subject, as we have seen, *International Harvester Company v. Kentucky*, 234 U. S. 579, 34 S. Ct. 944, 58 L. Ed. 1479, is the leading case. While there has been much discussion in respect to the facts on which that decision was based, showing that the salesmen, who there solicited orders had the authority to receive payment from customers in money, checks or drafts, that case is still unimpeached authority for the proposition that a foreign corporation may be made present within a state and amenable to service of the process of its courts by activities of such corporation's salesmen which constitute very little more than *mere* solicitation in order to render such corporation present and amenable to process. This is so whether the foreign corporation be registered or licensed, or subject to the state's right to demand that it be registered or licensed or not, and whether the corporation's business conducted by such salesmen within the state be wholly of interstate character or not.

In the *International Harvester Company* case, *supra*, the company appeared and moved to quash the return, claiming service was not made upon an authorized agent of the company and that the company was not doing business within the state of Kentucky. The court said, 234 U. S. 579, 58 L. Ed. 1479, 1481:

> "For some purposes a corporation is deemed to be a resident of the state of its creation; but when a corporation of one state goes into another, in order to be regarded as within the latter it must be there by its agents authorized to transact its business in that state. * * * [Case cited.]

As was said in that case, each case must depend upon its own facts, and their consideration must show that this essential requirement of jurisdiction has been complied with, and that the corporation is actually doing business within the state."

In respect to the facts, hereinabove summarized, the court said, at p. 1482, of 58 L. Ed.:

"* * * In order to hold it responsible under the process of the state court, it must appear that it was carrying on business within the state at the time of the attempted service [service was had on salesmen in the state of Kentucky]. As we have said, we think it was. *Here was a continuous course of business in the solicitation of orders* which were sent to another state, and in response to which the machines of the Harvester Company were delivered within the state of Kentucky. *This was a course of business, not a single transaction.* The agents not only solicited such orders in Kentucky, but might there receive payment in money, checks, or drafts. They might take notes of customers, which notes were made payable, and doubtless were collected, at any bank in Kentucky. *This course of conduct of authorized agents within the state in our judgment constituted a doing of business there in such wise that the Harvester Company might be fairly said to have been there, doing business, and amenable to the process of the courts of the state.*

* * * * * * * * * * *

"In the case now under consideration there was something more than mere solicitation. In response to the orders received, there was a continuous course of shipment of machines into Kentucky. There was authority to receive payment in money, check, or draft, and to take notes payable at banks in Kentucky." (Italics ours.)

In response to a contention that being engaged in interstate commerce the corporation was not amenable to process, the court continued, at p. 1483:

"We are satisfied that the presence of a corporation within a state necessary to the service of process

is shown *when it appears that the corporation is there carrying on business in such sense as to manifest its presence within the state,* although the business transacted may be entirely interstate in its character. In other words, this fact alone does not render the corporation immune from the ordinary process of the courts of the state." (Italics ours.)

A case similar to the *Harvester Company* case, and one frequently cited as authority on the question here at issue, is that of *American Asphalt Roof Corporation v. Shankland,* 205 Iowa 862, 865, 870, 219 N. W. 28, 60 A. L. R. 986, where in respect to facts somewhat similar it was properly observed that:

"The term 'doing business' within a state foreign to the one in which the corporation is organized and has its principal place of business is substantially defined by the Supreme Court as follows:

" 'The general rule deducible from all our decisions is that the business must be of such nature and character as to warrant the inference that the corporation has subjected itself to the local jurisdiction and is by its duly authorized officers or agents present within the state or district where service is attempted.' [Citing cases.]"

The court then quoted at length from the *International Harvester Company* case, and commented thereon as follows:

"We desire at this point to direct particular attention to the portion of the court's [in *Harvester Company* case] own language printed in italic. The continuous course of business referred to was the *solicitation of orders,* [italics by court] which were sent to another state, and in response to which the machines of the Harvester Company were delivered within the state of Kentucky. The court said, 'This was a course of business,—not a single transaction.' It is true that the above language is followed by a reference to the fact that the agents were authorized to receive notes, drafts, checks, money, etc., and

transmit the same to the Harvester Company. *Such transactions were, however, merely formal acts, and involved the exercise of no discretion* on the part of the agent, and were always referable to transactions closed by the approval of the order, and, no doubt, generally by the delivery of the machines. *These transactions are not given significance in what the court terms a continuous course of business.*

* * * * * * * * * * *

"Speaking for the circuit court of appeals of the ninth circuit, District Judge Hawley, in *Denver & R. G. R. Co. v. Roller, supra,* used the following significant language:

"'The general drift and tendency of judicial decisions, state and national, is in the direction of placing corporations upon the same plane as natural persons, in regard to the jurisdiction of suits by or against them. The statutes of the different states and of the United States have, as a general rule, been liberally construed for the purpose of sustaining this view, although the decisions of the state courts upon the precise point under discussion are not entirely harmonious. We are of opinion that the decided weight of authority and of reason is in favor of the jurisdiction of the state court over the present action, under the provisions of the statutes of California above cited, and upon the facts disclosed by the record.'

* * * * * * * * * * *

"* * * We recognize that the question is by no means free from difficulty; but it seems to us that the facts disclosed by the record establish that *petitioner was, and has been for many years, engaged in a systematic and continuous course of business in the solicitation of orders and the delivery and shipment of merchandise to numerous customers, new and long established, and that such conduct constitutes doing business in this state,* within the meaning of that term as used in Section 11072, and as construed and interpreted by the decisions of the Supreme Court of the United States. *If the corporation was doing business in this state, it will hardly be questioned that Killingsworth was a proper person upon whom service might be had.* We shall,

therefore, forego discussion on this point. It follows that the writ must be, and it is, annulled." (All Justices concur.) (Italics ours.)

Indicative of the extent to which the courts have gone in holding a foreign corporation to be present within a state, by reason of activities of order solicitors therein, is the case of *Frene v. Louisville Cement Company,* 134 F. (2d) 511, 146 A. L. R. 926. Typical of many like statements contained in the decision is that of the court at page 516 of 134 F. (2d):

> "It would seem, therefore, that the 'mere solicitation' rule should be abandoned when the soliciting activity is a regular, continuous and sustained course of business, as it is in this case. It constitutes, in the practical sense, both 'doing business' and 'transacting business,' and should do so in the legal sense. * * *"

Mr. Justice Rutledge did not abandon the above views when elevated to the United States Supreme Court. *General Trading Co. v. State Tax Com'n,* concurring opinion, 322 U. S., 349, 64 S. Ct. 1030.

In *Glynn v. Hyde-Murphy Company* (1920), 113 Misc. 329, 184 N. Y. S. 462, 463, it was held that a foreign corporation was doing business within the state to such an extent as to be amenable to service of process therein, where its sales agents continuously solicited orders for goods to be shipped into the state to the purchasers by the corporation, the court saying:

> "* * * We think that there was a continuous and permanent course of business transacted by defendant here. Agents here were continually employed to solicit and forward orders to defendant, to be filled in its factory in Pennsylvania. Suydam was clearly the sales agent in charge of the New York office. The defendant's name appeared on the door, its name at said address in telephone directory,

its letter heads state its New York office address, and its vice president directly in one of its letters referred to it. The 'fair measure of permanency and continuity' of activities, appearing in the moving papers, is sufficient to subject it to the jurisdiction of our courts."

To like effect is the case of *Heer and Company v. Rose Bros. Company* (1923), 120 Misc. Rep. 723, 200 N. Y. S. 397, and *Bogert and Hopper v. Wilder Manufacturing Company* (1921), 197 App. Div. 773, 189 N. Y. S. 444, where a foreign corporation was held to be doing business within a state, under a statute providing for service of process, where for six weeks it maintained a room in a hotel in the state during a trade fair, having its name over the door of the room, and had samples of its goods on display in said room and its agent in charge of the room solicited orders for goods to be shipped from another state to the purchasers, although such orders were not binding upon the corporation until approved by it at its home office.

In line with the great weight of authority on the point in question, (when the distincition between the cases dealing with corporations doing business so as to be amenable to procees and cases dealing with corporations doing business as affected by statutes imposing conditions or regulations on doing business, is carefully noted) is that of *Tauza v. Susquehanna Coal Company*, 220 N. Y. 259, 115 N. E. 915, 917, where, speaking for the court, Mr. Justice Cardozo, in his opinion, summed up the material facts as follows:

"* * * In brief, the defendant maintains an office in this state under the direction of a sales agent, with eight salesmen, and with clerical assistance, and through these agencies systematically and regularly

solicits and obtains orders which result in continuous shipments from Pensylvania to New York."

Mr. Justice Cardozo then proceeded in regard to these facts as follows:

"To do these things is to do business within this state in such a sense and in such a degree as to subject the corporation doing them to the jurisdiction of our courts. The decision of the Supreme Court in *International Harvester Co. v. Kentucky*, 234 U. S. 579, 34 Sup. Ct. 944, 58 L. ed. 1479, is precisely applicable. * * * That case goes further than we need to go to sustain the service here. It distinguishes *Green v. Chicago, B. & Q. Ry. Co.*, 205 U. S. 530, 27 Sup. Ct. 595, 51 L. ed. 916, where an agent in Pennsylvania solicited orders for railroad tickets which were sold, delivered, and used in Illinois. The orders did not result in a continuous course of shipments from Illinois to Pennsylvania. The activities of the ticket agent in Pennsylvania brought nothing into that state. *In the case at bar, as in the International Harvester Case, there has been a steady course of shipments from one state into the other. The business done in New York may be interstate business, but business it surely is.*"

After referring to cases involving statutes which license foreign corporations to do business within the state, the opinion continues at p. 918:

"* * * The essential thing is that the corporation shall have come into the state. When once it is here, it may be served; and the validity of the service is independent of the origin of the cause of action. * * * It is not necessary to show that express authority to accept service was given to the defendant's agent. *His appointment to act as agent within the state carried with it implied authority to exercise the powers which under our laws attach to his position.* * * * If the persons named are true agents, and if their positions are such as to lead to a just presumption that notice to them will be notice to the principal, the corporation must submit. * * *" (Italics ours.)

Several cases are then cited which the court held not to be *contra* to the ruling being made, saying:

> "* * * In those cases, the corporations had no agent within the state. The attempt was made to hold them by service on a public officer, whom the statute required them to designate as their agent, but whom they had refused or failed to designate. In the case before us, we have to deal with a very different situation. *The corporation is here; it is here in the person of an agent of its own selection; and service upon him is service upon his principal.*" (Italics ours.)

Touching both on the question of legal process and the question of liability of a foreign corporation engaged in interstate commerce for state compensation payments, the Pennsylvania court, in the late case of the *United Fruit Company v. Department of Labor and Industries*, appellant (March, 1942), 344 Pa. 172, 25 A. (2d) 171, 172, 173, states as follows:

> "The Commonwealth seeks to impale the company on the horns of a dialectic dilemma—either that our Workmen's Compensation Act is not applicable to its employees and therefor there is no need for the Company to apply for the privilege of self-insurance; or, if they do come within the act, the Company is not entitled to any privileges or benefits thereunder unless it first registers to do business within the state. Neither of these propositions can be sustained.
>
> "* * * * * * * * * * *
>
> "The Commonwealth suggests that the Company cannot be reached in this state with legal process unless it registers. There is no basis for this apprehension, inasmuch as *unregistered foreign corporations, even though engaged exclusively in interstate or foreign commerce, are not immune from the process of the local courts if they carry on business here in such sense as to manifest their presence within the state. International Harvester Company of America v. Kentucky*, 234 U. S. 579, 34 S. Ct. 944, 58 L. Ed. 1479." (Italics ours.)

IV

Appellant's Salesman Upon Whom Service Was Had Was Such an Agent as to Render Such Service Valid as to Appellant

Service of process upon Edward S. Alley, appellant's salesman in Washington, was made pursuant to Sec. 14 (c) of the Washington Unemployment Compensation Act providing for service of the order and notice of assessment (service of which initiated the present cause against appellant below) in the manner prescribed for the service of summons in civil actions which is provided for by section 7 of chapter 127, Session Laws of the state of Washington, 1893, page 410; Rem. Rev. Stat., section 226 (Appendix, p. 65) which provides:

> "Section 7. The summons shall be served by delivering a copy thereof as follows:
>
> * * * * * * * * *
>
> "(9) If the suit be against a foreign corporation or non-resident joint stock company or association *doing business* within this state, to *any* agent, cashier or secretary thereof." (Italics ours.)

Said section 14 (c) of the Washington act also provides for service by mailing the notice of assessment to an employer who cannot be found within the state, to his last known address by registered mail. Both methods were followed (R. p. 18).

Was appellant's salesman, Edward S. Alley, a resident of the state of Washington and engaged in Washington full time as appellant's authorized agent to solicit orders for appellant's footwear, such an agent of appellant as to constitute service of process on him good and valid service on appellant? Appellant contends he was not, his authority being limited to solicitation of orders.

If appellant was doing business in Washington so as to be "present" there, it was doing so through its agents. We have seen that orders for its merchandise was the heart of appellant's business and that activities performed in obtaining orders is "doing business" so as to render appellant amenable to service if such activities constitute anything more than "mere solicitation." *Hoopeston Canning Company v. Cullen*, 318 U. S. 313, 63 S. Ct. 602, 87 L. ed. 777; *International Harvester Co. v. Kentucky* (1914), 234 U. S. 579, 34 S. Ct. 944; *Frene v. Louisville Cement Co.*, 134 F. (2d) 511, 146 A. L. R. 926; *Tauza v. Susquehanna Coal Co.*, 220 N. Y. 259, 115 N. E. 915; *People's Tobacco Co., Ltd. v. American Tobacco Co.*, 246 U. S. 79, 62 L. ed. 587.

The effect of salesmen's activities is well stated in *State v. Scott* (1897), 98 Tenn. 254, 36 L. R. A. 461, 39 S. W. 1, 60 A. L. R. 994, 995, where the court makes the sensible and logical observation that:

> "* * * Instead of coming into this State themselves to solicit orders, those citizens of other States employ agents to do that for them; *and what the agents do has the same relation to and the same effect upon the ultimate and finished transaction as would the same thing if done in person by those citizens of other States.* With respect to that particular matter, the agents stand before the law exactly as their principals would stand if they had come on the same mission; * * *." (Italics ours.)

In *Connecticut Mutual Life Insurance Company v. Spratley*, 172 U. S. 602, 43 L. Ed. 569, the court, in dealing with the question of whether service on an agent of a foreign corporation doing business in a state was valid service on the corporation had the following to say:

> "* * * Even though we might be unprepared to say that a service of process upon 'any agent'

found within the county, as provided in the statute, would be sufficient in the case of a foreign corporation, the question for us to decide is whether upon the facts of this case the service of process upon the person named was a sufficient service to give jurisdiction to the court over this corporation. * * *"

While we do not cite the *Spratley* case, *supra,* as being factually identical to the instant cause, the principles therein set forth are certainly applicable to the point here under discussion. The court there stated the question as follows:

"* * * It is a question simply whether a power to receive service of process can reasonably and fairly be implied from the kind and character of agent employed. * * * The question turns upon the character of the agent, whether he is such that the law will imply the power and impute the authority to him, and if he be that kind of an agent, the implication will be made notwithstanding a denial of authority on the part of the other officers of the corporation.

* * * * * * * * * *

"* * * If it appear that there is a law of the state in respect to the service of process on foreign corporations, and that the character of the agency is such as to render it fair, reasonable, and just to imply an authority on the part of the agent to receive service, the law will and ought to draw such an inference and to imply such authority, and service under such circumstances and upon an agent of that character would be sufficient."

Commenting on the method of business done by foreign corporations generally and the trend of the law to extend jurisdiction of the forum where causes of action arise the opinion most aptly observes that:

"A vast mass of business is now done through the country by corporations which are chartered by states other than those in which they are transacting part of their business, and justice requires that some fair and reasonable means should exist for bringing

such corporations within the jurisdiction of the courts of the state where the business was done out of which the dispute arises."

Relying strongly on the *Spratley* case the Minnesota court in *Armstrong Company v. New York C. & H. R. R. Company*, 129 Minn. 104, 151 N. W. 917, 919, stated:

> "* * * It is reasonable that a foreign corporation, keeping and maintaining agents in this state for procuring business for its benefit and profit, should answer in this forum to a citizen of this state for a breach of contract or duty arising out of business so procured, *and that agents engaged in procuring such business should be deemed the representatives of the corporation for the purpose of bringing it into court as well* (see *Conn. Mutual Life Ins. Co. v. Spratley*, 172 U. S. 602, 613, 19 Sup. Ct. 308, 43 L. Ed. 569); and we believe the authorities are in harmony with this view." (Italics ours.)

To the same effect is the decision of this court in *Board of Trade of City of Chicago v. Hammond Elevator Company*, 198 U. S. 424; 25 S. Ct. 740; 49 L. Ed. 1111, wherein it was held that denial by officers of the corporation that the agent served was clothed with sufficient authority to make such service good as to the corporation and that where the facts disclosed that the implication of such authority was reasonable, the law would impute that authority to the agent. The court there noted the undesirable results of not so holding and stated in part at page 1119, 49 L. Ed.:

> "* * * It is evident that if these correspondents be not regarded as agents in these transactions, it is possible for the defendant to establish similar correspondents in a dozen cities in at least a dozen states of the union, and an enormous business be built up, in which the defendant company is the real principal, with no possibility of being sued except in the states of Indiana and Delaware."

Likewise relying on the *Spratley* case is *Tauza v. Susquehanna Coal Co. supra*, where Mr. Justice Cardozo, speaking for the court stated in respect to the validity of service of process upon the salesman of a foreign corporation:

> "* * * It is not necessary to show that express authority to accept service was given to the defendant's agent. *His appointment to act as agent within the state carried with it implied authority to exercise the powers which under our laws attach to his position.* (Citing cases.)"

In *Denver and R. G. R. R. Co. v. Roller*, (C. C. A. 9th Circuit) 100 Fed. 738, 741, District Judge Hawley, speaking for the court, said:

> "* * * It will be noticed that, if there is no cashier or secretary upon whom service can be made, the Code does not specify the extent of the agency required in order to bind a nonresident corporation by service of summons, except that the person must be a 'managing or business agent.' It is obvious that this does not mean that it must be the general managing agent of the corporation. *The object of the service is attained when the agent served is of sufficient rank and character as to make it reasonably certain that the corporation will be notified of the service*, and the statute is complied with if he be a managing or business agent in *any* specified line of business transacted by the corporation in the state where the service is made. * * *
>
> "* * * * * * * * * *

"In *Merchants' Mfg. Co. v. Grand Trunk Ry. Co.* (C. C.) 13 Fed. 358, the court said:

> "'* * * At common law, process must be served on its [a foreign corporation] principal officer within the jurisdiction of the sovereignty where the corporate body exists. But it can waive this requirement, and consent to be served in a different manner, and when it does this it stands on the same footing with a natural person. *When it avails itself of the privileges of doing business in a state whose laws authorize it to be sued there by service of process upon*

> *an agent, its assent to that mode of service is implied.* Accordingly it has been repeatedly held that a foreign corporation consents to be amenable to suit by such mode of service as the laws of the state provide, when it invokes the comity of the state for the transaction of its affairs. (Citing cases.).'" (Italics ours.)

V

The State Court's Determination Is Binding as to Facts Necessary to Bring Appellant Within the State's Statutes

Whether Mr. Alley, appellant's salesman-agent, upon whom service of process was had in the instant cause, was such an agent as contemplated by the state statute (Rem. Rev. Stat. section 226, subsection 9) is certainly a matter solely within the province of the state supreme court to decide and its decision in the cause below that Mr. Alley was such an agent is binding upon this court. *International Harvester Co. v. Kentucky* (1914), 234 U. S. 579, 34 S. Ct. 944, 58 L. Ed. 1479. As stated in *General Trading Company v. State Tax Commission of Iowa*, 322 U. S. 335, 337, 64 S. Ct. 1028, 1029, 88 L. Ed. 1309, 1311:

> "* * * The application by that Court [Iowa Supreme Court] of its local laws and the facts on which it founded its judgment are of course controlling here. * * *"

For this court to say in review of the decision of the supreme court of the state of Washington that appellant was not "doing business" or that Mr. Alley was not an "agent" within the meaning of the state service statute, Rem. Rev. Stat. section 226, subsection 9, is to do no more than to say that in view of the facts disclosed by the records in this cause, the state supreme court's determination of these questions was entirely arbitrary and capricious, there being no substantial evidence to support the

view taken, and that consequently appellant, not having been shown to be doing business within the state, could not have been "present" therein and thus the due process clause of the Fourteenth Amendment to the constitution is violated in holding it subject to the jurisdiction of the state court.

Such a conclusion on the part of this court would, we submit, require blind indifference to the principles laid down by this court and the majority of the state courts. As to the facts disclosed in this cause, we submit that it is not only fair and reasonable, but necessary, to conclude that appellant was "doing business" within the state of Washington to such an extent as to indicate most clearly its presence in the state. It was present through its salesmen, whose activities produced the very business upon which appellant's existence as a going concern was dependent. As clearly pointed out by the state supreme court in its decision in this cause, below, appellant was present through its agents, not occasionally but continuously. Said agents devoted their full time, over a period of years, to the building up of appellant's business in Washington through competent display of appellant's sample lines in display rooms, some of which were permanently maintained in business buildings and others of which were temporarily maintained in cities within the state frequently visited by appellant's salesmen. The adequate display of appellant's products was a result of a careful and elaborate training program on the part of the appellant pursuant to which its salesmen were required regularly (usually twice a year, and at least once a year) to attend training conferences at St. Louis, Missouri. (R. pp. 10-13.) These activities resulted in a large volume of sales and

continuous flow of appellant's merchandise into the state (R. pp. 19-22), and likewise resulted in appellant's close contact with its credit accounts within the state. (R. p. 12.) Appellant would have this court state that all of this was incidental solely to and constituted nothing more than mere solicitation. The authorities do not bear out such contention.

VI.

The Law Provides No Sanctuary For Appellant From Tax. Appellant May Not Hide Behind Sales Agents

To adopt appellant's contentions in this cause is to ignore entirely the steadily increasing trend on the part of the courts generally to extend jurisdiction of the local forum in cases of this type over foreign corporations. As was stated by Mr. Justice Gray in *Barrow Steamship Company v. Kane*, 170 U. S. 100, 42 L. Ed. 964, 966:

> "The constant tendency of judicial decisions in modern times has been in the direction of putting corporations upon the same footing as natural persons in regard to the jurisdiction of suits by or against them."

Beach v. Kerr Turbine Company, (D. C.) 243 Fed. 706, 711: "The tendency of legislation and of judicial decisions is and has been to make it easy to obtain jurisdiction of foreign corporations. * * * *"Frene v. Louisville Cement Co.*, 134 Fed. (2d) 511, 516: "* * * In general the trend has been toward a wider assertion of power over nonresidents and foreign corporations than was considered permissible when the tradition about 'mere solicitation' grew up."

VII.

Due Process In This Cause was Satisfied by Adequate Notice

The constitutional requirement of due process insofar as it is concerned with the service of process upon an

agent in a case of this nature is, we submit, satisfied if the individual upon whom service is made is of sufficient rank and character as to make it reasonably certain that the corporation will be notified of the service. *Denver & R. G. R. Co., supra.* And certainly it must be said here that in view of the very close connection between appellant and its employe-salesman, Mr. Alley, service upon the latter made it reasonably certain that appellant would be notified of the service. Furthermore, while perhaps not determinative, the fact should not be overlooked that service was also had upon appellant in this cause by mailing the notice of assessment by registered mail to appellant at its principal place of business in Missouri. In point in this respect is *Connecticut Mutual Life Insurance Company v. Spratley*, 172 U. S. 602, 19 S. Ct. 308, 43 L. Ed. 569, 572, wherein speaking of a similar situation, the court took occasion to note that taking service on the agent in that case in connection with service provided for in the statute of a copy of the process of notice by registered mail to the home office of the company "it must be admitted that one of the chief objects of all such kinds of service, mainly, notice and knowledge on the part of the company of the commencement of suit against it, is certainly provided for. * * *" The constitutionality of service statutes is dependent only on the presence and efficacy of the means adopted to give the defendant actual notice of the proceedings. *Wuchter v. Pizzutti*, 276 U. S. 13, 72 L. Ed. 446.

VIII.

Appellant's Position Not Supported By Authorities and Contravenes Public Policy

We submit that Mr. Alley's status as an agent of appellant was of sufficient rank and character so as to render

service on him good and valid service as to appellant. Appellant has suggested that Mr. Alley had no knowledge of tax matters and that his interest in this suit would, in any event, disqualify him as a proper agent upon whom service could be had. Authorities are entirely lacking to support appellant's contention that these factors render service unconstitutional as to appellant. Appellant chose to conduct what is a major and vital part of its business in the state of Washington through salesmen-agents such as Mr. Alley and certainly it is estopped in the event of a suit of this nature being brought against it from saying that for the purposes of the suit it was not present within the state through its selected and employed salesman. As a matter of fact the suit involves the very thing which appellant's salesmen were engaged in doing, to-wit: performance of services for appellant within the state of Washington. And certainly if interest is to disqualify, the officers of the corporation themselves, if they had been engaged in doing for the corporation what Mr. Alley was doing, would *a fortiori* be disqualified.

Appellant, in its brief to this court, urges strongly the case of *Flexner v. Farson*, 248 U. S. 289, 63 L. Ed. 250, as authority for its contention that there is no jurisdiction in the instant cause to assess appellant by service on its agent. Appellant contends further in this connection that in this cause, substituted service is involved and that to be valid as against appellant, there must be a showing that the state has at least the right to control the business of appellant, or to require its registration in Washington.

The complete answer to appellant's contentions in this respect is, of course, that the *Flexner* case simply is not in point. That case deals with actual substituted

service as such. There a partnership was existent in Illinois. Suit was brought in Kentucky by service on Flexner, who had been, *but at the time of suit was not an agent of the partnership in Kentucky.* It was argued that the Kentucky service statute made Flexner a *continued* agent for the purpose of service, in respect to suits arising out of business done in Kentucky at a time when Flexner actually was an agent there of the partnership. This argument was based on an analogy of foreign corporation law to the effect that in a case where the state could control a corporation by requiring a designated agent in the state, such agent could thereafter be served, and that such service would be valid as against the corporation, even after the corporation had ceased doing business there.

In the instant cause, we have neither an end of the agency relationship at the time of service, nor substituted service, nor do we have any control question present whatsoever. The service statute of the state of Washington here in question is entirely different than that involved in the *Flexner* case and does not purport to continue one formerly designated as an agent as the proper agent for suits after termination of an agency in Washington or after termination of the corporation's prosecution of business in Washington.

It is very evident that appellant's reliance on the *Flexner* case is in disregard of the facts and circumstances involved in the instant cause. Certainly, the *Flexner* case, *supra,* and the line of authorities following it, has no effect whatsoever upon the well settled rule that a foreign corporation not registered nor licensed to do business in the state, nor subject to the state's rights to

compel such registration or to impose conditions upon the right to do business in the state may nonetheless be doing business within the state to such an extent as will justify the legal conclusion that the corporation itself is, through its agents, actually present within the state and thus subject to the state's jurisdiction and power to tax and to the process of the state's courts.

We are not here concerned with a corporation which has, at the time of institution of the proceedings in question, ceased doing business, nor with the question of service upon one who was not at the time an employee of the corporation, engaged in performing services for the corporation. Again, as to due process, under the circumstances here present, the question turns solely upon the presence and efficacy of the state's service statute to provide actual notice to the corporation of the institution of proceedings against it.

Appellant urges also that the state of Washington has no means of enforcing the judgment rendered against it for the tax in question, and that because of this fact the judgment is a nullity; appellant arguing further that jurisdiction to impose a liability must mean power to impose and enforce it, and that because such power is claimed to be lacking there is no validity in the judgment. The simple answer to such a contention is, of course, that this court is in no way concerned in this appeal with any question of enforcement of the judgment in question. That issue is not before it.

It should be noted, however, that to adopt appellant's contention in this respect would be to nullify and render entirely impotent the whole unitary federal-state plan which Congress and the legislatures of each of the several

states have adopted for the purpose of providing relief to a host of workers against the hazards of involuntary unemployment. *Buckstaff Bath House Company v. McKinley*, 308 U. S. 358, 84 L. Ed. 322; section 1606(a), United States Internal Revenue Code, formerly section 906, Social Security Act of 1935, Title IX (Appendix, page 66).

CONCLUSION

Appellant, through the activities of its salesmen in the state of Washington during the period in question, was doing business within the meaning of the state service statute, providing for service upon such a foreign corporation by service upon *any* agent of such corporation. Mr. Alley, appellant's salesman-agent in the state of Washington, was such an agent, as contemplated by said state service statute.

The facts disclosed in the record in this cause show activities on the part of appellant's salesmen, including Mr. Alley, which constituted more than "mere-solicitation." Appellant, being "present" within the state at the time suit was instituted and at all times in question, cannot support its contention of immunity on the basis of cases concerning the power of a state to impose conditions upon the right of a foreign corporation to do business. With regulatory taxes, licensing requirements, and exactions levied by a state for the privilege of doing business, we are not concerned.

The agent served in the instant cause had such relationship with appellant as to render service on him valid as to appellant. The trend of the law has, for a long

time, been in the direction of extending the jurisdiction of the states over foreign corporations, especially in cases of this kind where public policy and public interest in the objects to be attained are clearly evident. Under the authorities which are relevant and in point, the judgment of the state supreme court in this cause below must be affirmed as valid and not in contravention of any constitutional requirement, guarantee or prohibition.

There is a compelling practical reason, founded in public policy and endorsed by the federal Congress and the legislatures of each of the several states, why the jurisdiction of the state courts over foreign corporations should be extended to cover those similarly situated with appellant. The tax, the imposition of which appellant claims violates due process, is for the protection of workers in the various states against the hazards of unemployment. The unitary federal-state plan, adopted by Congress and the legislatures of the states, is designed to protect against the very result which appellant, asserting its non-resident foreign character, urges must obtain, due to its carefuly worked out plan for doing business in the various states so as to be present there for all purposes beneficial to it, but not present so as to be compelled to bear its just share of the burden of local state government. The state act brings non-resident foreign corporations within its operation to the same extent as resident and domestic corporations. It is evidently felt that workers, especially those resident within the state, performing services and earning their livelihood (wages) in the state, should have the benefit of wage credits set up for them by the state where they live and work, and where their period of unemployment, if any, is most likely to occur.

To adopt appellant's contentions would not only force the various states to all journey to appellant's chosen situs to solicit from it its fair and just share of the expense of local governmental functions, but, if appellant be held not liable in the state where its employees are doing a vital part of its business, then the anomalous situation is presented of a state being required to pay benefits to appellant's employees, who have earned their wages in that state, out of that state's fund which is built up by contributions of appellant's competitors. Certainly, conscience does not permit the assumption that appellant's employees should have to look to a fund established in Missouri (and there is no showing that they have any rights to Missouri's unemployment compensation fund), and, when financially embarrassed at a time of unemployment, be required to seek redress from a denial of benefits by Missouri in the courts of that state.

The law and the record and appellant, in its brief, are all silent as to how its employees, performing services for it in Washington (for which privilege enjoyed by appellant in Washington the tax is assessed) are to have protection against the hazards of involuntary unemployment, if appellant's contention be sustained, except at the expense of appellant's competitors who are resident and domestic corporations in Washington. Due process, we submit, works both ways. Certainly appellant is "doing business" in Washington, within the meaning of the Washington service statute, as utilized by the Washington unemployment compensation act as a means of obtaining jurisdiction over a foreign corporation which is not registered nor licensed to do business in Washington.

Appellant, having chosen to come into Washington by its selected, trained employees, to obtain the life-blood of its business—orders—enabling it to sell its merchandise and there enjoy the privilege of having its chosen representatives perform these services for it ("happy-go-lucky men," as appellant calls them, though they may be), may not now be heard to say that it was present in Washington only for purposes of benefit to it, but not present so as to be required to share with domestic competitors the expense of governmental functions designed to protect its own employees as well as theirs. Appellant may not so hide behind and so desert its own salesmen. A huge group of workers (employees of foreign corporations) should not be deprived of the benefits of legislation, endorsed and sponsored by the federal Congress, simply because they reside and labor within what appellant would ask to have established as a constitutional hiatus. Due process, we repeat, works both ways. The judgment of the state supreme court should be affirmed.

Respectfully submitted,

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APPENDIX

Statutes of the State of Washington, and federal statutes, pertinent to this case; declaring purpose and policy; prescribing conditions of liability for unemployment compensation contributions, and providing for levy of the tax, process and appeal; all as relate to a foreign corporation present within the state through employed salesmen soliciting orders for the corporation's products. (Italics are supplied.)

THE UNEMPLOYMENT COMPENSATION ACT OF THE STATE OF WASHINGTON

Section 2: Section 2, chapter 162, Session Laws of 1937, Rem. Rev. Stat. Supp., section 9998-102:

"Whereas, economic insecurity due to unemployment is a serious menace to the health, morals and welfare of the people of this state; involuntary unemployment is, therefore, a subject of general interest and concern which requires appropriate action by the legislature to prevent its spread and to lighten its burden which now so often falls with crushing force upon the unemployed worker and his family. Social security requires protection against this greatest hazard of our economic life. This can be provided only by application of the insurance principle or sharing the risks, and by the systematic accumulation of funds during periods of employment to provide benefits for periods of unemployment, thus maintaining purchasing powers and limiting the serious social consequences of poor relief assistance. The State of Washington, therefore, exercising herein its police and sovereign power endeavors by this act to remedy the widespread unemployment situation which now exists and to set up safeguards to prevent its recurrence in years to come. The legislature, therefore, declares that in its considered judgment the public good, and the general welfare of the citizens of this state require the enactment of this measure, under the police powers of the state, for the compulsory setting aside of unemployment reserves to be used for the benefit of

persons unemployed through no fault of their own, and that this act shall be liberally construed for the purpose of reducing involuntary unemployment and the suffering caused thereby to the minimum."

Section 7: Section 7, chapter 162, p. 587, Session Laws of 1937, as amended by section 5, chapter 214, p. 830, Session Laws of 1939, Rem. Rev. Stat. Supp., section 9998-107:

"(a) PAYMENT.

"(1) On and after January 1, 1937, contributions shall accrue and become payable by each employer for each calendar year in which he is subject to this act, with respect to wages *payable* for employment (as defined in section 19 (g)) occurring during such calendar year, such contributions shall become due and be paid by each employer to the treasurer for the fund in accordance with such regulation as the commissioner may prescribe, and shall not be deducted, in whole or in part, from the remuneration of individuals in his employ;

"(2) In the payment of any contribution, a fractional part of a cent shall be disregarded unless it amounts to one-half cent or more, in which case it shall be increased to 1 cent.

"(b) RATE OF CONTRIBUTION. Each employer shall pay contributions equal to the following percentages of wages *payable* by him with respect to employment:

"(1) One and eight-tenths (1.8%) per centum with respect to employment during the calendar year 1937;

"(2) Two and seven-tenths (2.7%) per centum with respect to employment during the calendar years thereafter.

Section 19 (e): Section 19 (e), chapter 162, p. 609, Session Laws of 1937, as amended by section 16, chapter 214, p. 853, Session Laws of 1939, Rem. Rev. Stat. Supp., section 9998-119a (e):

"(e) 'Employing unit' means any individual or type of organization, including any partnership,

association, trust, estate, joint-stock company, insurance company or corporation, *whether domestic or foreign,* or the receiver, trustee in bankruptcy, trustee or successor thereof, or the legal representative of a deceased person, which has or subsequent to January 1, 1937, had in its employ one or more individuals performing services for it within this state. All individuals performing services within this state for any employing unit which maintains two or more separate establishments within this state shall be deemed to be employed by a single employing unit for all the purposes of this act.

"* * * * * * * * * *"

Section 19 (f): Section 19 (f), chapter 162, p. 609, Session Laws of 1937, Rem. Rev. Stat. Supp., section 9998-119 (f):

"(f) 'Employer' means:

"(1) Any employing unit which in each of twenty different weeks within either the current or the preceding calendar year (whether or not such weeks are or were consecutive) has or had in employment eight or more individuals (not necessarily simultaneously and irrespective of whether the same individuals are or were employed in each such week);

"(2) * * * * * * * *

"(3) * * * * * * * *

"(4) * * * * * * * *

"(5) * * * * * * * *

"(6) * * * * * * * *"

Section 19 (g)(1)(2)(3)(4) and (5): Section 19 (g) (1) (2) (3) (4) and (5), chapter 162, pp. 610-612, Session Laws of 1937, as amended by section 16, chapter 214, pp. 856-857, Session Laws of 1939, Rem. Rev. Stat. Supp., sections 9998-119a (g) (1) (2) (3) (4) and (5):

"(g) (1) 'Employment,' subject to the other provisions in this sub-section, means *service, including service in interstate commerce,* performed for wages or under any contract of hire, written or oral, express or implied.

"(2) The term 'employment' shall include an individual's entire *service. performed* within or both within and without this state if: (i) The service is localized in this state; or (ii) the service is not localized in any state but some of the service is performed in this state and (a) the base of operations, or if there is no base of operations, then the place from which such service is directed or controlled is in this state; or (b) the base of operations or place from which such service is directed or controlled is not in any state in which some part of the service is performed, but the individual's residence is in this state.

"(3) Services not covered under paragraph (2) of this sub-section, and performed entirely without this state, with respect to no part of which contributions are required and paid under an unemployment compensation law of any other state or of the Federal government, shall be deemed to be employment subject to this act if the individual performing such services is a resident of this state and the commissioner approves the election of the employing unit for whom such services are performed that the entire service of such individual shall be deemed to be employment subject to this act.

"(4) Service shall be deemed to be localized within a state if:

"(i) The service is performed entirely within such state; or

"(ii) The service is performed both within and without such state, but the service performed without the state is incidental to the individual's service within such state, for example, is temporary or transitory in nature or consists of isolated transactions.

"(5) Services performed by an individual for renumeration shall be deemed to be employment subject to this act unless and until it is shown to the satisfaction of the commissioner that:

"(i) Such individual has been and will continue to be free from control or direction over the performance of such service, both under his contract of service and in fact; and

"(ii) Such service is either outside the usual course of the business for which such service is per-

formed, or that such service is performed outside of all the places of business of the enterprises for which such service is performed; and

"(iii) Such individual is customarily engaged in an independently established trade, occupation, profession or business, of the same nature as that involved in the contract of service."

Section 19 (m): Section 19 (m), chapter 162, p. 614, Session Laws of 1937, as amended by section 16, chapter 214, p. 860, Session Laws of 1939, Rem. Rev. Stat. Supp., section 9998-119a (m):

"(m) 'Wages' means the first three thousand dollars of remuneration *payable* by one employer to an individual worker for employment during any calendar year. 'Remuneration' means all compensation *payable* for personal services, including commissions and bonuses and the cash value of all compensation *payable* in any medium other than cash. The reasonable cash value of compensation *payable* in any medium other than cash, and the reasonable amount of gratuities, shall be estimated and determined in accordance with rules prescribed by the director; but until Congress shall amend title IX of the Federal Social Security Act approved August 14, 1935, to similarly limit the amount of taxable wages to three thousand dollars the term 'wages' for the purposes of this act shall be deemed to mean all remuneration payable by employers for employment."

Section 14 (c): Section 11, chapter 253, p. 906, Session Laws of 1941, Rem. Supp., 1941, section 9998-114c:

"Section 14 (c). At any time after the Commissioner shall find that any contribution or the interest thereon have become delinquent, the Commissioner may issue a notice of assessment specifying the amount due, which notice of assessment shall be served upon the delinquent employer *in the manner prescribed for the service of summons in a civil action*, except that if the employer cannot be found within the state, said notice will be deemed served *when mailed to the delinquent employer at his last*

known address by registered mail. If the amount so assessed is not paid within ten days after such service or mailing of said notice, the Commissioner or his duly authorized representative shall collect the amount stated in said assessment by the distraint, seizure and sale of the property, goods, chattels and effects of said delinquent employer. There shall be exempt from distraint and sale under this section such goods and property as are exempt from execution under the laws of this state."

Section 6 (c)(d)(e) and (i): Section 6 (c) (d) (e) and (i), chapter 162, pp. 583-586, Session Laws of 1937, as amended by section 4, chapter 214, pp. 825-829, Session Laws of 1939, as amended by section 4, chapter 253, pp. 881-884, Session Laws of 1941, Rem. Supp., 1941, section 9998-106c, d, e and i:

"Section 6 (c). APPEALS. When an appeal is taken, as provided in the foregoing section, unless such appeal is withdrawn, an appeal tribunal, after affording the parties reasonable opportunity for fair hearing, shall affirm or modify the findings of fact and decision of the unemployment compensation division. The parties shall be duly notified of such tribunal's decision, together with its reasons therefor, which shall be deemed to be the final decision on the claim, unless within ten days after the date of notification of mailing, whichever is the earlier, of such decision further appeal is initiated pursuant to section 6 (e).

"Section 6 (d). APPEAL TRIBUNALS. The Commissioner shall establish one or more impartial appeal tribunals each of which shall be presided over by a salaried Examiner who shall decide the issues submitted to the tribunal. No Examiner shall hear or decide any disputed claim in any case in which he is an interested party.

"Section 6 (e). REVIEW. The Commissioner may on his own motion, or upon the petition of any interested party, shall, affirm, modify, or set aside any decision of an appeal tribunal on the basis of the evidence previously submitted in such case, or direct the taking of additional evidence. The Commissioner

may transfer to another appeal tribunal the proceedings on any claim pending before an appeal tribunal.

* * * * * * * * * * * *

"Section 6 (i). COURT REVIEW. Within thirty days after final decision has been communicated to any interested party, such interested party may appeal to the Superior Court of the county of his residence, and such appeal shall be heard as a case in equity but upon such appeal only such issues of law may be raised as were properly included in his application before the appeal tribunal. The proceedings of every such appeal shall be informal and summary, but full opportunity to be heard upon the issues of law shall be had before judgment is pronounced. Such appeal shall be perfected by filing with the Clerk of the Court a notice of appeal and by serving a copy thereof by mail or personally on the Commissioner, and the filing and service of said notice of appeal within thirty days shall be jurisdictional. The Commissoner shall within twenty days after receipt of such notice of appeal serve and file his notice of appearance upon appellant or his attorney of record, and such appeal shall thereupon be deemed at issue. No bond shall be required on such appeal or on appeals to the Superior or the Supreme Courts. When a notice of final decision has been placed in the United States mail properly addressed, it shall be considered *prima facie* evidence of communication to the appellant and his attorney, if of record.

"The Commisisoner shall serve upon the appellant and file with the Clerk of the Court before trial a certified copy of his complete record of the claim which shall upon being so filed become the record in such case. No fee of any kind shall be charged the Commissioner for filing his appearance or for any other services performed by the Clerk of either the Superior or the Supreme Court.

"If the Court shall determine that the Commissioner has acted within his power and has correctly construed the law, the decision of the Commissioner shall be confirmed; otherwise, it shall be reversed or modified. In case of a modification or reversal the Superior Court shall refer the same to the Commissioner with an order directing him to proceed in accordance with the findings of the Court: *Provided*,

That any award shall be in accordance with the schedule of unemployment benefits set forth in this act.

"It shall be unlawful for any attorney engaged in any such appeal to the Courts as provided herein to charge or receive any fee therein in excess of a reasonable fee to be fixed by the Courts in the case, and if the decision of the Commissioner shall be reversed or modified, such fee and the fees of witnesses and the costs shall be payable out of the Unemployment Compensation Administration Fund. In other respects the practice in civil cases shall apply. Appeal shall lie from the judgment of the Superior Court to the Supreme Court as in other civil cases. In all Court proceedings under or pursuant to this act the decision of the Commissioner shall be *prima facie* correct, and the burden of proof shall be upon the party attacking the same.

"Whenever any appeal is taken from any decision of the Commissioner to any Court, all expenses and costs incurred therein by said Commissioner including court reporter costs and attorney's fees and all costs taxed against such Commissioner shall be paid out of the Unemployment Compensation Administration Fund."

State Process Statute for Civil Actions:

Section 7, p. 408, Session Laws of 1893, Rem. Rev. Stat., section 226, subsection 9:

"The summons shall be served by delivering a copy thereof, as follows:

"* * * * * * * * * *

"(9) If the suit be against a foreign corporation or nonresident joint stock company or association doing business within this state, to *any* agent, cashier or secretary thereof;

"* * * * * * * * * *"

Federal Statute Precluding Immunity to Foreign Corporations:

53 Stat. 187, as amended by 53 Stat. 1391, 26 U. S. C., section 1606 (a):

> "No person required under a State law to make payments to an unemployment fund shall be relieved from compliance therewith on the ground that he is engaged in interstate or foreign commerce, or that the State law does not distinguish between employees engaged in interstate or foreign commerce and those engaged in intrastate commerce."

SUPREME COURT OF THE UNITED STATES.

No. 107.—October Term, 1945.

International Shoe Company, Appellant, *vs.* State of Washington, Office of Unemployment Compensation and Placement and E. B. Riley, Commissioner.	Appeal from the Supreme Court of the State of Washington.

[December 3, 1945.]

Mr. Chief Justice Stone delivered the opinion of the Court.

The questions for decision are (1) whether, within the limitations of the due process clause of the Fourteenth Amendment, appellant, a Delaware corporation, has by its activities in the State of Washington rendered itself amenable to proceedings in the courts of that state to recover unpaid contributions to the state unemployment compensation fund exacted by state statutes, Washington Unemployment Compensation Act, Washingon Revised Statutes, § 9998-103a through § 9998-123a, 1941 Supp., and (2) whether the state can exact those contributions consistently with the due process clause of the Fourteenth Amendment.

The statutes in question set up a comprehensive scheme of unemployment compensation, the costs of which are defrayed by contributions required to be made by employers to a state unemployment compensation fund. The contributions are a specified percentage of the wages payable annually by each employer for his employees' services in the state. The assessment and collection of the contributions and the fund are administered by respondents. Section 14(c) of the Act [Wash. Rev. Stat., 1941 Supp., § 9998-114c] authorizes respondent Commissioner to issue an order and notice of assessment of delinquent contributions upon prescribed personal service of the notice upon the employer if found within the state, or, if not so found, by mailing the notice to the employer by registered mail at his last known address. That section also authorizes the Commissioner to collect the assesment by distraint if it is not paid within ten days after service of the notice. By §§ 14e and 6b the order of assessment may be administratively reviewed by an appeal tribunal within

the office of unemployment upon petition of the employer, and this determination is by § 61 made subject to judicial review on questions of law by the state Superior Court, with further right of appeal in the state Supreme Court as in other civil cases.

In this case notice of assessment for the years in question was personally served upon a sales solicitor employed by appellant in the State of Washington, and a copy of the notice was mailed by registered mail to appellant at its address in St. Louis, Missouri. Appellant appeared specially before the office of unemployment and moved to set aside the order and notice of assessment on the ground that the service upon appellant's salesman was not proper service upon appellant; that appellant was not a corporation of the State of Washington and was not doing business within the state; that it had no agent within the state upon whom service could be made; and that appellant is not an employer, and does not furnish employment within the meaning of the statute.

The motion was heard on evidence and a stipulation of facts by the appeal tribunal which denied the motion and ruled that respondent Commissioner was entitled to recover the unpaid contributions. That action was affirmed by the Commissioner; both the Superior Court and the Supreme Court affirmed. 122 Wash. Dec. 135. Appellant in each of these courts assailed the statute as applied, as a violation of the due process clause of the Fourteenth Amendment, and as imposing a constitutionally prohibited burden on interstate commerce. The cause comes here on appeal under § 237(a) of the Judicial Code, 28 U. S. C. § 344(a), appellant assigning as error that the challenged statutes as applied infringe the due process clause of the Fourteenth Amendment and the commerce clause.

The facts as found by the appeal tribunal and accepted by the state Superior Court and Supreme Court, are not in dispute. Appellant is a Delaware corporation, having its principal place of business in St. Louis, Missouri, and is engaged in the manufacture and sale of shoes and other footwear. It maintains places of business in several states, other than Washington, at which its manufacturing is carried on and from which its merchandise is distributed interstate through several sales units or branches located outside the State of Washington.

Appellant has no office in Washington and makes no contracts either for sale or purchase of merchandise there. It maintains no stock of merchandise in that state and makes there no deliveries of goods in intrastate commerce. During the years from 1937 to 1940,

now in question, appellant employed eleven to thirteen salesmen under direct supervision and control of sales managers located in St. Louis. These salesmen resided in Washington; their principal activities were confined to that state; and they were compensated by commissions based upon the amount of their sales. The commissions for each year totaled more than $31,000. Appellant supplies its salesmen with a line of samples, each consisting of one shoe of a pair, which they display to prospective purchasers. On occasion they rent permanent sample rooms, for exhibiting samples, in business buildings, or rent rooms in hotels or business buildings temporarily for that purpose. The cost of such rentals is reimbursed by appellant.

The authority of the salesmen is limited to exhibiting their samples and soliciting orders from prospective buyers, at prices and on terms fixed by appellant. The salesmen transmit the orders to appellant's office in St. Louis for acceptance or rejection, and when accepted the merchandise for filling the orders is shipped f.o.b. from points outside Washington to the purchasers within the state. All the merchandise shipped into Washington is invoiced at the place of shipment from which collections are made. No salesman has authority to enter into contracts or to make collections.

The Supreme Court of Washington was of opinion that the regular and systematic solicitation of orders in the state by appellant's salesmen, resulting in a continuous flow of appellant's product into the state, was sufficient to constitute doing business in the state so as to make appellant amenable to suit in its courts. But it was also of opinion that there were sufficient additional activities shown to bring the case within the rule frequently stated, that solicitation within a state by the agents of a foreign corporation plus some additional activities there are sufficient to render the corporation amenable to suit brought in the courts of the state to enforce an obligation arising out of its activities there. *International Harvester v. Kentucky*, 234 U. S. 579, 587; *People's Tobacco Co. v. American Tobacco Co.*, 246 U. S. 79, 87; *Frene v. Louisville Cement Co.*, 134 F. 2d 511, 516. The court found such additional activities in the salesmen's display of samples sometimes in permanent display rooms, and the salesmen's residence within the state, continued over a period of years, all resulting in a substantial volume of merchandise regularly shipped by appellant to purchasers within the state. The court also held that the statute as applied did not invade the constitutional power of Congress to regulate inter-

state commerce and did not impose a prohibited burden on such commerce.

Appellant's argument, renewed here, that the statute imposes an unconstitutional burden on interstate commerce need not detain us. For 53 Stat. 1391, 26 U. S. C. § 1606 (a) provides that "No person required under a State law to make payments to an unemployment fund shall be relieved from compliance therewith on the ground that he is engaged in interstate or foreign commerce, or that the State law does not distinguish between employees engaged in interstate or foreign commerce and those engaged in intrastate commerce." It is no longer debatable that Congress, in the exercise of the commerce power, may authorize the states, in specified ways, to regulate interstate commerce or impose burdens upon it. *Kentucky Whip & Collar Co.* v. *Illinois Central R. Co.*, 299 U. S. 334; *Perkins* v. *Pennsylvania*, 314 U. S. 586; *Standard Dredging Co.* v. *Murphy*, 319 U. S. 306, 308; *Hooven & Allison* v. *Evatt*, 324 U. S. 652, 679; *Southern Pacific Co.* v. *Arizona*, No. 56, 1944 Term, decided June 18, 1945, slip opinion p. 6.

Appellant also insists that its activities within the state were not sufficient to manifest its "presence" there and that in its absence the state courts were without jurisdiction, that consequently it was a denial of due process for the state to subject appellant to suit. It refers to those cases in which it was said that the mere solicitation of orders for the purchase of goods within a state, to be accepted without the state and filled by shipment of the purchased goods interstate, does not render the corporation seller amenable to suit within the state. See *Green* v. *Chicago, Burlington & Quincy Ry.*, 205 U. S. 530, 533; *International Harvester* v. *Kentucky*, *supra*, 586-587; *Phila. & Reading Ry. Co.* v. *McKibbin*, 243 U. S. 264, 268; *People's Tobacco Co.* v. *American Tobacco Co.*, *supra*, 87. And appellant further argues that since it was not present within the state, it is a denial of due process to subject it to taxation or other money exaction. It thus denies the power of the state to lay the tax or to subject appellant to a suit for its collection.

Historically the jurisdiction of courts to render judgment *in personam* is grounded on their de facto power over the defendant's person. Hence his presence within the territorial jurisdiction of a court was prerequisite to its rendition of a judgment personally binding him. *Pennoyer* v. *Neff*, 95 U. S. 714, 733. But now that the *capias ad respondendum* has given way to personal service of summons or other form of notice, due process requires only that in order to subject a defendant to a judgment *in personam*, if he

be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice." *Milliken* v. *Meyer*, 311 U. S. 457, 463. See Holmes, J., in *McDonald* v. *Mabee*, 243 U. S. 90, 91. Compare *Hoopeston Canning Co.* v. *Cullen*, 318 U. S. 313, 316, 319. See *Blackmer* v. *United States*, 284 U. S. 421; *Hess* v. *Pawloski*, 274 U. S. 352; *Young* v. *Masci*, 289 U. S. 253.

Since the corporate personality is a fiction, although a fiction intended to be acted upon as though it were a fact, *Klein* v. *Board of Supervisors*, 282 U. S. 19, 24, it is clear that unlike an individual its "presence" without, as well as within, the state of its origin can be manifested only by activities carried on in its behalf by those who are authorized to act for it. To say that the corporation is so far "present" there as to satisfy due process requirements, for purposes of taxation or the maintenance of suits against it in the courts of the state, is to beg the question to be decided. For the terms "present" or "presence" are used merely to symbolize those activities of the corporation's agent within the state which courts will deem to be sufficient to satisfy the demands of due process. L. Hand, J., in *Hutchinson* v. *Chase & Gilbert*, 45 F. 2d 139, 141. Those demands may be met by such contacts of the corporation with the state of the forum as make it reasonable, in the context of our federal system of government, to require the corporation to defend the particular suit which is brought there. An "estimate of the inconveniences" which would result to the corporation from a trial away from its "home" or principal place of business is relevant in this connection. *Hutchinson* v. *Chase & Gilbert*, *supra*, 141.

"Presence" in the state in this sense has never been doubted when the activities of the corporation there have not only been continuous and systematic, but also give rise to the liabilities sued on, even though no consent to be sued or authorization to an agent to accept service of process has been given. *St. Clair* v. *Cox*, 106 U. S. 350, 355; *Mutual Life Ins. Co.* v. *Spratley*, 172 U. S. 602, 610-611; *Penna. Lumbermen's Ins. Co.* v. *Meyer*, 197 U. S. 407, 414-415; *Commercial Mutual Accident Co.* v. *Davis*, 213 U. S. 245, 255-256; *International Harvester* v. *Kentucky*, *supra*; cf. *St. Louis S. W. Ry.* v. *Alexander*, 227 U. S. 218. Conversely it has been generally recognized that the casual presence of the corporate agent or even his conduct of single or isolated items of activities in a state in the corporation's behalf are not enough to subject it to

suit on causes of action unconnected with the activities there. *St. Clair* v. *Cox*, *supra*, 359-360; *Old Wayne Life Ass'n* v. *McDonough*, 204 U. S. 8, 21; *Frene* v. *Louisville Cement Co.*, *supra*, 515, and cases cited. To require the corporation in such circumstances to defend the suit away from its home or other jurisdiction where it carries on more substantial activities has been thought to lay too great and unreasonable a burden on the corporation to comport with due process.

While it has been held, in cases on which appellant relies, that continuous activity of some sorts within a state is not enough to support the demand that the corporation be amenable to suits unrelated to that activity, *Old Wayne Life Ass'n* v. *McDonough*, *supra*; *Green* v. *Chicago, Burlington & Quincy Ry.*, *supra*; *Simon* v. *Southern R. Co.*, 236 U. S. 115; *People's Tobacco Co.* v. *American Tobacco Co.*, *supra*; cf. *Davis* v. *Farmer's Cooperative Eq.*, 262 U. S. 312, 317, there have been instances in which the continuous corporate operations within a state were thought so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities. See *Missouri, K. & T. Ry.* v. *Reynolds*, 255 U. S. 565; *Tauza* v. *Susquehanna Coal Co.*, 220 N. Y. 259; cf. *St. Louis S. W. Ry.* v. *Alexander*, *supra*.

Finally, although the commission of some single or occasional acts of the corporate agent in a state sufficient to impose an obligation or liability on the corporation has not been thought to confer upon the state authority to enforce it, *Rosenberg Bros. & Co.* v. *Curtis Brown Co.*, 260 U. S. 516, other such acts, because of their nature and quality and the circumstances of their commission, may be deemed sufficient to render the corporation liable to suit. Cf. *Kane* v. *New York*, 242 U. S. 160; *Hess* v. *Pawloski*, *supra*; *Young* v. *Masci*, *supra*. True, some of the decisions holding the corporation amenable to suit have been supported by resort to the legal fiction that it has given its consent to service and suit, consent being implied from its presence in the state through the acts of its authorized agents. *Lafayette Insurance Co.* v. *French*, 18 How. 404, 407; *St. Clair* v. *Cox*, *supra*, 356; *Commercial Mutual Accident Co.* v. *Davis*, *supra*, 254; *Washington* v. *Superior Court*, 289 U. S. 361, 364-365. But more realistically it may be said that those authorized acts were of such a nature as to justify the fiction. *Smolik* v. *P. and R. C. & I. Co.*, 222 Fed. 148, 151. Henderson, The Position of Foreign Corporations in American Constitutional Law, 94-95.

It is evident that the criteria by which we mark the boundary line between those activities which justify the subjection of a corporation to suit, and those which do not, cannot be simply mechanical or quantitative. The test is not merely, as has sometimes been suggested, whether the activity, which the corporation has seen fit to procure through its agents in another state, is a little more or a little less. *St. Louis S. W. Ry.* v. *Alexander, supra,* 228; *International Harvester* v. *Kentucky, supra,* 587. Whether due process is satisfied must depend rather upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure. That clause does not contemplate that a state may make binding a judgment *in personam* against an individual or corporate defendant with which the state has no contacts, ties, or relations. Cf. *Pennoyer* v. *Neff, supra; Minnesota Ass'n* v. *Benn,* 261 U. S. 140.

But to the extent that a corporation exercises the privilege of conducting activities within a state, it enjoys the benefits and protection of the laws of that state. The exercise of that privilege may give rise to obligations, and, so far as those obligations arise out of or are connected with the activities within the state, a procedure which requires the corporation to respond to a suit brought to enforce them can, in most instances, hardly be said to be undue. Compare *International Harvester* v. *Kentucky, supra,* with *Green* v. *Chicago, Burlington & Quincy Ry., supra,* and *People's Tobacco Co.* v. *American Tobacco Co., supra.* Compare *Mutual Life Ins. Co.* v. *Spratley, supra,* 619, 620 and *Commercial Mutual Accident Co.* v. *Davis, supra,* with *Old Wayne Life Ass'n* v. *McDonough, supra.* See 29 Columbia Law Review, 187-195.

Applying these standards, the activities carried on in behalf of appellant in the State of Washington were neither irregular nor casual. They were systematic and continuous throughout the years in question. They resulted in a large volume of interstate business, in the course of which appellant received the benefits and protection of the laws of the state, including the right to resort to the courts for the enforcement of its rights. The obligation which is here sued upon arose out of those very activities. It is evident that these operations establish sufficient contacts or ties with the state of the forum to make it reasonable and just according to our traditional conception of fair play and substantial justice to permit the state to enforce the obligations which appellant has

incurred there. Hence we cannot say that the maintenance of the present suit in the State of Washington involves an unreasonable or undue procedure.

We are likewise unable to conclude that the service of the process within the state upon an agent whose activities establish appellant's "presence" there was not sufficient notice of the suit, or that the suit was so unrelated to those activities as to make the agent an inappropriate vehicle for communicating the notice. It is enough that appellant has established such contacts with the state that the particular form of substituted service adopted there gives reasonable assurance that the notice will be actual. *Mutual Life Ins. Co.* v. *Spratley*, *supra*, 618, 619; *Board of Trade* v. *Hammond Elevator Co.*, 198 U. S. 424, 437-438; *Commercial Mutual Accident Co.* v. *Davis*, *supra*, 254-255. Cf. *Riverside Mills* v. *Menefee*, 237 U. S. 189, 194, 195; see *Knowles* v. *Gaslight & Coke Co.*, 19 Wall. 58, 61; *McDonald* v. *Mabee*, *supra*; *Milliken* v. *Meyer*, *supra*. Nor can we say that the mailing of the notice of suit to appellant by registered mail at its home office was not reasonably calculated to apprise appellant of the suit. Compare *Hess* v. *Pawloski*, *supra*, with *McDonald* v. *Mabee*, *supra*, 92, and *Wuchter* v. *Pizzuti*, 276 U. S. 13, 19, 24; cf. *Bequet* v. *MacCarthy*, 2 B. & Ad. 951; *Maubourquet* v. *Wyse*, 1 Ir. Rep. C. L. 471. See *Washington* v. *Superior Court*, *supra*, 365.

Only a word need be said of appellant's liability for the demanded contributions to the state unemployment fund. The Supreme Court of Washington, construing and applying the statute, has held that it imposes a tax on the privilege of employing appellant's salesmen within the state measured by a percentage of the wages, here the commissions payable to the salesmen. This construction we accept for purposes of determining the constitutional validity of the statute. The right to employ labor has been deemed an appropriate subject of taxation in this country and England, both before and since the adoption of the Constitution. *Steward Machine Co.* v. *Davis*, 301 U. S. 548, 579, *et seq.* And such a tax imposed upon the employer for unemployment benefits is within the constitutional power of the states. *Carmichael* v. *Southern Coal Co.*, 301 U. S. 495, 508, *et seq.*

Appellant having rendered itself amenable to suit upon obligations arising out of the activities of its salesmen in Washington, the state may maintain the present suit *in personam* to collect the tax laid upon the exercise of the privilege of employing appellant's

salesmen within the state. For Washington has made one of those activities, which taken together establish appellant's "presence" there for purposes of suit, the taxable event by which the state brings appellant within the reach of its taxing power. The state thus has constitutional power to lay the tax and to subject appellant to a suit to recover it. The activities which establish its "presence" subject it alike to taxation by the state and to suit to recover the tax. *Equitable Life Society* v. *Pennsylvania*, 238 U. S. 143, 146; cf. *International Harvester Co.* v. *Department of Taxation*, 322 U. S. 435, 442, *et seq.*, *Hoopeston Canning Co.* v. *Cullen*, *supra*, 316-319; see *General Trading Co.* v. *Tax Comm'n*, 322 U. S. 335.

Affirmed.

Mr. Justice JACKSON took no part in the consideration or decision of this case.

Mr. Justice BLACK delivered the following opinion.

Congress, pursuant to its constitutional power to regulate commerce, has expressly provided that a State shall not be prohibited from levying the kind of unemployment compensation tax here challenged. 26 U. S. C. 1600. We have twice decided that this Congressional consent is an adequate answer to a claim that imposition of the tax violates the Commerce Clause. *Perkins* v. *Pennsylvania*, 314 U. S. 586 affirming 342 Pa. 529; *Standard Dredging Co.* v. *Murphy*, 319 U. S. 306, 308. Two determinations by this Court of an issue so palpably without merit are sufficient. Consequently that part of this appeal which again seeks to raise the question seems so patently frivolous as to make the case a fit candidate for dismissal. *Fay* v. *Crozer*, 217 U. S. 455. Nor is the further ground advanced on this appeal, that the State of Washington has denied appellant due process of law, any less devoid of substance. It is my view, therefore, that we should dismiss the appeal as unsubstantial,[1] *Seaboard Air Line Ry. Co.* v. *Watson*, 287 U. S. 86, 90, 92, and decline the invitation to formulate broad rules as to the meaning of due process, which here would amount

[1] This Court has on several occasions pointed out the undesirable consequences of a failure to dismiss frivolous appeals. Salinger v. United States, 272 U. S. 542, 544; United Surety Co. v. American Fruit Product Co., 238 U. S. 140; De Bearn v. Safe Deposit & Trust Co., 233 U. S. 24, 33-34.

to deciding a constitutional question "in advance of the necessity for its decision." *Alabama State Federation of Labor* v. *McAdory*, 325 U. S. 703; 89 L. Ed. 1270, 1277.

Certainly appellant can not in the light of our past decisions meritoriously claim that notice by registered mail and by personal service on its sales solicitors in Washington did not meet the requirements of procedural due process. And the due process clause is not brought in issue any more by appellant's further conceptualistic contention that Washington could not levy a tax or bring suit against the corporation because it did not honor that State with its mystical "presence." For it is unthinkable that the vague due process clause was ever intended to prohibit a State from regulating or taxing a business carried on within its boundaries simply because this is done by agents of a corporation organized and having its headquarters elsewhere. To read this into the due process clause would in fact result in depriving a State's citizens of due process by taking from the State the power to protect them in their business dealings within its boundaries with representatives of a foreign corporation. Nothing could be more irrational or more designed to defeat the function of our federative system of government. Certainly a State, at the very least, has power to tax and sue those dealing with its citizens within its boundaries, as we have held before. *Hoopeston Canning Co.* v. *Cullen*, 318 U. S. 313. Were the Court to follow this principle, it would provide a workable standard for cases where, as here, no other questions are involved. The Court has not chosen to do so, but instead has engaged in an unnecessary discussion in the course of which it has announced vague Constitutional criteria applied for the first time to the issue before us. It has thus introduced uncertain elements confusing the simple pattern and tending to curtail the exercise of State powers to an extent not justified by the Constitution.

The criteria adopted insofar as they can be identified read as follows: Due Process does permit State courts to "enforce the obligations which appellant has incurred" if it be found "reasonable and just according to our traditional conception of fair play and substantial justice." And this in turn means that we will "permit" the State to act if upon "an 'estimate of the inconveniences' which would result to the corporation from a trial away from its 'home' or principal place of business", we conclude that

it is "reasonable" to subject it to suit in a State where it is doing business.

It is true that this Court did use the terms "fair play" and "substantial justice" in explaining the philosophy underlying the holding that it could not be "due process of law" to render a personal judgment against a defendant without notice to and an opportunity to be heard by him. *Milliken* v. *Meyer*, 311 U. S. 457. In *McDonald* v. *Mabee*, 243 U. S. 90, 91, cited in the *Milliken* case, Mr. Justice Holmes speaking for the Court warned against judicial curtailment of this opportunity to be heard and referred to such a curtailment as a denial of "fair play", which even the common law would have deemed "contrary to natural justice." And previous cases had indicated that the ancient rule against judgments without notice had stemmed from "natural justice" concepts. These cases, while giving additional reasons why notice under particular circumstances is inadequate, did not mean thereby that all legislative enactments which this Court might deem to be contrary to natural justice ought to be held invalid under the due process clause. None of the cases purport to support or could support a holding that a State can tax and sue corporations only if its action comports with this Court's notions of "natural justice." I should have thought the Tenth Amendment settled that.

I believe that the Federal Constitution leaves to each State, without any "ifs" or "buts", a power to tax and to open the doors of its courts for its citizens to sue corporations whose agents do business in those States. Believing that the Constitution gave the States that power, I think it a judicial deprivation to condition its exercise upon this Court's notion of "fair-play", however appealing that term may be. Nor can I stretch the meaning of due process so far as to authorize this Court to deprive a State of the right to afford judicial protection to its citizens on the ground that it would be more "convenient" for the corporation to be sued somewhere else.

There is a strong emotional appeal in the words "fair play", "justice", and "reasonableness." But they were not chosen by those who wrote the original Constitution or the Fourteenth Amendment as a measuring rod for this Court to use in invalidating State or Federal laws passed by elected legislative representatives. No one, not even those who most feared a democratic government,

ever formally proposed that courts should be given power to invalidate legislation under any such elastic standards. Express prohibitions against certain types of legislation are found in the Constitution, and under the long settled practice, courts invalidate laws found to conflict with them. This requires interpretation, and interpretation, it is true, may result in extension of the Constitution's purpose. But that is no reason for reading the due process clause so as to restrict a State's power to tax and sue those whose activities affect persons and businesses within the State, provided proper service can be had. Superimposing the natural justice concept on the Constitution's specific prohibitions could operate as a drastic abridgment of democratic safeguards they embody, such as freedom of speech, press and religion,[2] and the right to counsel. This has already happened. *Betts* v. *Brady*, 316 U. S. 455. Compare *Feldman* v. *United States*, 322 U. S. 487, 494-503. For application of this natural law concept, whether under the terms "reasonableness", "justice", or "fair play", makes judges the supreme arbiters of the country's laws and practices. *Polk* v. *Glover*, 305 U. S. 5, 17-18; *Federal Power Commission* v. *Natural Gas Pipeline Co.*, 315 U. S. 575, 600, n. 4. This result, I believe, alters the form of government our Constitution provides. I cannot agree.

True, the State's power is here upheld. But the rule announced means that tomorrow's judgment may strike down a State or Federal enactment on the ground that it does not conform to this Court's idea of natural justice. I therefore find myself moved by the same fears that caused Mr. Justice Holmes to say in 1930:

"I have not yet adequately expressed the more than anxiety that I feel at the ever increasing scope given to the Fourteenth Amendment in cutting down what I believe to be the constitutional rights of the States. As the decisions now stand, I see hardly any limit but the sky to the invalidating of those rights if they happen to strike a majority of this Court as for any reason undesirable." *Baldwin* v. *Missouri*, 281 U. S. 586, 595.

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[2] These First Amendment liberties—freedom of speech, press and religion—provide a graphic illustration of the potential restrictive capacity of a rule under which they are protected at a particular time only because the Court, as then constituted believes them to be a requirement of fundamental justice. Consequently, under the same rule, another Court, with a different belief as to fundamental justice, could at least as against State action, completely or partially withdraw Constitutional protection from these basic freedoms, just as though the First Amendment had never been written.